

SEP 26 1977

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No.

77-4781

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT P. KANE, *Attorney General*
Capitol Annex
Harrisburg, Pa. 17120

BARNETT SATINSKY, *Chief Counsel*
JOHN B. WILSON, *Asst. Counsel*
CANDACE N. KREIGER, *Asst. Counsel*
Penna. Public Utility Commission
P.O. Box 3265
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL, *Special
Asst. Counsel*
1100 17th Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

SEPTEMBER 1977

TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED: Whether the U.S. Court of Appeals, upon motion of the petitioner and over objection of intervening petitioners, properly dismissed a proceeding brought to review a decision of the Interstate Commerce Commission, where the effect may be to eliminate any judicial review of the agency decision owing to expiration of the statutory 60-day period for instituting an independent petition for review by the intervenors	2
STATUTES AND RULES INVOLVED	3
STATEMENT	6
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW CONFLICTS WITH THE "NOTICE" FORM OF PETITION FOR REVIEW PRESCRIBED BY THIS COURT	11
II. THE DECISION BELOW IS INCONSISTENT WITH ALLOWING AN INTERVENOR TO RAISE ADDITIONAL CLAIMS IN JUDICIAL REVIEW OF AN AGENCY DECISION	14
CONCLUSION	16
APPENDIX: Appendix A— Order of dismissal (April 1, 1977)	1a

	<u>Page</u>
Appendix B— Order denying petition for rehearing (April 28, 1977)	2a
Appendix C— Order dismissing motion to consolidate as moot	4a
Appendix D— Joint Petition for Review (December 27, 1976)	5a
Appendix E— Interstate Commerce Commission, I. & S. Docket No. 9108, report and order decided October 28, 1977 (served Octo- ber 29)	9a
Appendix F— Interstate Commerce Commission, I. & S. Docket No. 9108 (Complaint), report and order decided January 28, 1977 (served February 3)	59a
Appendix G— Petition for Review (February 3, 1977) . .	67a

TABLE OF CITATIONS

	<u>Page</u>
Cases:	
Air Line Pilots Association International v. C.A.B., 514 F.2d 834 (D.C. Cir. 1975)	16
Auto Workers v. Scofield, 382 U.S. 205 (1965)	14
Borough of Moosic v. United States, 272 F. Supp. 513 (M.D. Pa. 1967)	15
Chem-Haulers, Inc. v. United States, 536 F.2d 610 (5th Cir. 1976)	5, 15
Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission v. Interstate Commerce Commis- sion and United States of America (No. 77-1147, D.C. Cir., pending)	7, 9
Corning Glass Works and Thatcher Glass Manufacturing Company v. Interstate Commerce Commission and United States of America (No. 76-2153, D.C. Cir.)	<i>passim</i>
Delaware and Hudson Railroad Corp. v. United States, 279 F. Supp. 311 (S.D.N.Y. 1967)	15
Erie-Lackawanna Railroad Company v. United States, 279 F. Supp. 303, 313, 316 (S.D.N.Y. 1967)	15
Hickman v. Taylor, 329 U.S. 495 (1947)	11
New York Central Railroad Company v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961)	14
Pasadena City Bd. of Education v. Spangler, 427 U.S. 424 (1976)	14

	<u>Page</u>
Penn-Central Merger Cases, 389 U.S. 486 (1968)	15
Rules of Appellate Procedure, 389 U.S. 1063 (1968)	11
Rules of Appellate Procedure, 43 F.R.D. 61 (1967)	12
Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969)	14
Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 822 (2d Cir. 1963)	14
United States v. Bursey, 515 F.2d 1228 (5th Cir. 1975)	15
Widing Transp., Inc. v. I.C.C., 545 F.2d 654 (9th Cir. 1976)	15
Upshaw v. United States, 335 U.S. 410 (1948)	11

	<u>Page</u>
Rules:	
15, F.R.A.P.	4, 8, 9, 12, 13, 14
24, F.R.Civ.P.	15
Miscellaneous:	
4 Moore Fed. P. (2d Ed) 24.16-17	15

Statutes:

28 U.S.C. 1254	2
28 U.S.C. 2072	5, 11
28 U.S.C. 2323	14
28 U.S.C. 2341	3, 12
28 U.S.C. 2344	3, 7, 8, 12, 13
28 U.S.C. 2348	5, 9, 11, 14
49 U.S.C. 15(8)	7
49 U.S.C. 1486	16

In the
Supreme Court of the United States
October Term, 1977

No.

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioners, Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission, respectfully pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit, entered in this proceeding on April 1, 1977.

OPINIONS BELOW

The order of the U.S. Court of Appeals, dismissing the review proceeding, not reported, is printed as Appendix A hereto. (App. 1a).

The reports and orders of the Interstate Commerce Commission in its I. & S. Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, not yet reported, are printed as Appendix E and Appendix F. (App. 9a-66a).

JURISDICTION

The judgment of the U.S. Court of Appeals dismissing the petition for review was entered April 1, 1977, and is printed as Appendix A hereto. (App. 1a). The order denying rehearing was entered April 28, 1977, and is printed as Appendix B hereto. (App. 2a). The time for filing a petition for writ of certiorari was extended by Mr. Justice Brennan to and including September 25, 1977.

This Court's jurisdiction is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the U.S. Court of Appeals, upon motion of the petitioner and over objection of intervening petitioners, properly dismissed a proceeding brought to review a decision of the Interstate Commerce Commission, where the effect may be to eliminate any judicial review of the agency decision owing to expiration of the statutory 60-day period for instituting an independent petition for review by the intervenors.

STATUTES AND RULES INVOLVED

The principal statutes and rules involved herein concern the contents of a petition for review of an agency order under the Hobbs Act,¹ and the status of an intervenor who was a party to the agency proceeding.

28 U.S.C. 2344:

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of —

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

¹ 28 U.S.C. 2341-51.

Rule 15, Federal Rules of Appellant Procedure:

(a) **PETITION FOR REVIEW OF ORDER;**
JOINT PETITION. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

.....

(d) **INTERVENTION.** Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the

proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

28 U.S.C. 2348:

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 U.S.C. 2072:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs,

pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

.....
All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. . . .

STATEMENT

This proceeding to review a report and order of the Interstate Commerce Commission ("I.C.C.") was dismissed by the Court of Appeals without reaching the merits, and without filing the agency record with the Court. No. 76-2153, *Corning Glass Works and Thatcher Glass Manufacturing Company v. Interstate Commerce Commission and United States of America*. The dismissal of the proceeding was over the vigorous objection by these intervening petitioners in the review proceeding, namely, Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission (hereinafter, "Pennsylvania").

As a result of the dismissal of this proceeding, the United States of America now urges the court below, in Pennsylvania's subsequently-filed independent petition for review, that Pennsylvania is barred from challenging the

I.C.C.'s decision because the 60-day period for instituting judicial review has expired.²

The proceeding below (No. 76-2153) was instituted directly in the U.S. Court of Appeals under the Hobbs Act by two shippers³ using the Trailer-on-Flat-Car ("TOFC") ramp at Elmira, N.Y., to review the October 29, 1976 report and order issued by the 3-member Division 2 of the I.C.C. (App. 9a-58a). The I.C.C.'s determination was rendered in a tariff suspension proceeding, where an initial decision by the hearing officer had been omitted due to the 7-month statutory suspension period.⁴ (App. 11a). In its report and order, Division 2 allowed Consolidated Rail Corporation ("ConRail") to terminate TOFC service at 24 stations,⁵ and denied permission for closing TOFC service at 3 stations.⁶

Petitions for reconsideration of Division 2's determination were submitted by a number of parties to the agency proceeding.

² 28 U.S.C. 2344. This position was taken by the United States in its brief in No. 77-1147 (D.C. Cir.), *Commonwealth of Pennsylvania v. I.C.C.*, involving review of the same I.C.C. order. (App. 2a-4a, 67a).

³ Corning Glass Works and Thatcher Glass Manufacturing Company.

⁴ 49 U.S.C. 15(8). 90 Stat. 36-39.

⁵ Fort Wayne and South Bend, Indiana; Benton Harbor and Grand Rapids, Michigan; Akron, Cleveland, and Lima, Ohio; Binghamton, Buffalo, Elmira, Niagara Falls (EL), Niagara Falls (LV), Port Jervis, Syracuse, and Utica, New York; Allentown, Harrisburg, Hershey, Lancaster, Reading, Scranton, Sharon, Swedeland, and Wilkes-Barre, Pennsylvania.

⁶ Huntington, Indiana; Marion, Ohio; and Kalamazoo, Michigan.

The petition for review in the U.S. Court of Appeals was filed by the Elmira, N.Y. parties on December 27, 1976, 60 days after the October 28 order of Division 2,⁷ despite the pending petitions for reconsideration with the agency. The Elmira, N.Y. petition for review was prepared in the form called for by 28 U.S.C. 2344, and specifically so stated (App. 5a), rather than in the short-form notice set forth by Rule 15(a) of the Federal Rules of Appellate Procedure. (App. 5a-8a). The relief sought in the petition for review was that the I.C.C.'s order be set aside. The grounds on which the relief was sought was that Division 2's conclusion as to cancellation of TOFC service at Elmira was invalid. (App. 7a).

Pennsylvania was allowed to intervene in the review proceeding, as were ConRail and New York State Department of Transportation. (App. 1a). Such intervention by parties to the agency proceeding is by right. 28 U.S.C. 2348.

Thereafter, on February 2, 1977, the entire I.C.C. served its report and order disposing of the petitions for reconsideration. (App. 59a-66a). The agency ruled that the petitions for reconsideration were to be treated as "complaints" against existing rates, rather than reconsideration of a prior decision, in view of the amended section 15 (8)(a) of the Interstate Commerce Act. The I.C.C. found the October 29 decision by Division 2 to have been administratively final, and thus not subject to petitions for reconsideration. (App. 59a-60a). This construction of section 15(8)(a) was of first impression, coming as a surprise

⁷ The October 28 order was served October 29, 1976. (App. 9a), so that the court filing was made on the 59th day after service. Cf. *Chem-Haulers, Inc. v. United States*, 536 F.2d 610 (5th Cir. 1976).

to the parties, including ConRail, who had filed and responded to petitions for reconsideration. The October 29 report and order constituted the first agency decision in the proceeding.

On the merits, the February 2 report reversed the earlier determination as to Elmira, N.Y., thus restoring TOFC service at that point, but the I.C.C. found that the petitions as to stations in Pennsylvania and other states were devoid of merit. (App. 60a).

Pennsylvania on February 3, 1977, instituted its own petition for review of the I.C.C.'s October 29, 1976, and February 2, 1977 reports and orders, and moved the court for consolidation of the Elmira and Pennsylvania cases. No. 77-1147, *Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission v. Interstate Commerce Commission and United States of America*. Pennsylvania's petition, unlike that of the Elmira, N.Y. parties, was in the "notice" form mentioned in Rule 15(a) F.R.A.P., and set forth in Form No. 3 to F.R.A.P. (App. 67a). Thus in its petition for review, Pennsylvania did not set forth grounds as to the unlawfulness of the I.C.C. decisions.

The Elmira, N.Y. parties and ConRail were allowed to intervene in Pennsylvania's case. (App. 4a). Pennsylvania wishes to restore service at Reading and Sharon, Pa.

The Elmira parties thereupon moved to dismiss their petition for review, on the ground that the relief they were seeking had been granted by the subsequent agency order. The I.C.C. and ConRail supported dismissal of the case, and also urged that the Pennsylvania's motion for consolidation be denied. The United States of America took no position.⁸ The Pennsylvania parties strongly

⁸ 28 U.S.C. 2348 would seem to prohibit the Attorney General from participation with the I.C.C. on this score. "The Attorney (continued)

opposed dismissal, pointing out that their February 3, 1977 petition for review was filed more than 60 days from service of the October 29 agency report and order, such that a contention might be raised that their petition for review was untimely.⁹

The Court of Appeals on April 1, 1977¹⁰ dismissed the Elmira, N.Y. petition for review, on the ground that the only issue properly before the Court is the lawfulness of the cancellation of service at Elmira. (App. 1a):

Upon consideration of petitioners' motion to dismiss, respondents' supporting memorandum and intervenors' opposition, and it appearing that the only issue properly before the Court is the lawfulness of the cancellation of service at Elmira, New York, it is

ORDERED by the Court that the motion to dismiss is granted.

With respect to the motion by Pennsylvania to consolidate the two proceedings, the Court of Appeals on the same day dismissed the motion to consolidate as moot in light of the dismissal of No. 76-2153. (App. 4a).

8 (continued)

General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General."

⁹ Such fears were well founded. The U.S. Department of Justice now urges such dismissal on the grounds of timeliness.

¹⁰ Bazelon, Chief Judge and Wright, Circuit Judge.

Pennsylvania's petition for rehearing of these two orders was denied on April 28, 1977. (App. 2a-3a).

REASONS FOR GRANTING THE WRIT

This proceeding presents important federal jurisdictional and procedural issues which warrant review by this Court. *Hickman v. Taylor*, 329 U.S. 495 (1947); *Upshaw v. United States*, 335 U.S. 410 (1948).

The Court of Appeals held that Pennsylvania, by way of intervention in a direct review proceeding brought by shippers at Elmira, N.Y. to set aside an I.C.C. order, could not challenge issues other than the TOFC ramp at Elmira, N.Y., even though a single order was issued for 27 stations, and despite the fact that Pennsylvania was granted intervention as a matter of right as it was a party to the agency proceeding. 28 U.S.C. 2348. Thus the case was dismissed, over objection, when the Elmira parties withdrew their opposition to the agency order.

I. THE DECISION BELOW CONFLICTS WITH THE "NOTICE" FORM OF PETITION FOR REVIEW PRESCRIBED BY THIS COURT.

The Supreme Court promulgated the Federal Rules of Appellate Procedure to become effective July 1, 1968. *Rules of Appellate Procedure*, 389 U.S. 1063 (1968). Title IV pertains to judicial review of administrative agencies, boards, commissions and officers. These rules replaced individual Circuit rules which were often in conflict. More important, 28 U.S.C. 2072 provides that all laws in conflict with such rules shall be of no further force or effect.

Rule 15(a) governs the contents of a Petition for Review of an I.C.C. order.¹¹ Only the parties seeking review, respondent, and the agency order need be specified. Rule 15(a) reads in part:

The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review.

The Elmira, N.Y. parties filed a lengthy petition for review, indicating the "grounds upon which relief is sought", and other specifications as set forth in 28 U.S.C 2344. (App. 7a). However, the Advisory Committee's Note in *Rules of Appellate Procedure*, 43 F.R.D. 61, 137 states that Rule 15(a) supersedes the requirements of 28 U.S.C. 2344:

The proposed rule supersedes 28 U.S.C. 2344 and other statutory provisions prescribing the form of the petition for review and permits review to be initiated by the filing of a simple petition similar in form to the notice of appeal used in appeals from judgments of district courts. The more elaborate form of petition for review now required is rarely useful either to the litigants or to the courts. There is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs.

If the Elmira, N.Y. parties had filed the simple "notice" form of petition for review, there would have been no

¹¹ P.L. 93-584 (Jan. 2, 1975) changed the mode of review for I.C.C. decisions from three-judge district courts to the U.S. Courts of Appeals. 28 U.S.C. 2341-51.

basis for the Court below to have confined the scope of the proceeding to the TOFC service at Elmira, N.Y. In going beyond the three elements specified in Rule 15(a), F.R.A.P., the Court of Appeals considered matters no longer applicable to the requirements for a petition for review.¹² Once Elmira, N.Y. petitioned for review of the entire order, rather than merely a part thereof, the petition for review gave the court jurisdiction over the entire order. It is immaterial to the scope of the proceeding that the allegations of unlawfulness specified in the petition ran only against conclusions of the agency report bearing upon TOFC service at Elmira, N.Y.

The real effect of the decision below will be to encourage the use of the outmoded and superseded form of review contained in 28 U.S.C. 2344, which will allow a petitioner to limit the scope of agency review against any intervenors, and force such intervenors to file their own petition for review. The number of "proceedings" may show a busy Court of Appeals, but we wonder whether such a sea of paperwork is in the interest of sound judicial administration.

The Court below erred in holding that Elmira's petition for review only properly brings the lawfulness of the cancellation of service at Elmira, N.Y. before the Court. When Elmira specified the entire order for review, the subject of judicial review became that entire order, rather than any particular ground for setting aside the order.

¹² Pennsylvania's subsequent petition for review was in the notice form. (App. 67a).

II. THE DECISION BELOW IS INCONSISTENT WITH ALLOWING AN INTERVENOR TO RAISE ADDITIONAL CLAIMS IN JUDICIAL REVIEW OF AN AGENCY DECISION.

Even if the petition for review filed by the Elmira, N.Y. parties is construed to embrace review of only that part of the I.C.C.'s order discontinuing the proceeding with respect to the proposed cancellation of TOFC service at Elmira, N.Y., the Court of Appeals erred in not allowing Pennsylvania to broaden the proceeding so as to include the proposed cancellation of TOFC service at Reading and Sharon, Pa.

The Federal Rules of Appellate Procedure do not contemplate intervention in the ordinary appeal from a district court. However, various statutes provide for review of agency orders directly in the Court of Appeals, and Rule 15(d), F.R.A.P. governs intervention.¹³

The trend of decisions is not to restrict an intervenor to the original claims of the petitioner. *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969), vac. other grd's sub nom. *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 427 (1976); *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 827 (2d Cir. 1963); *New York Central Railroad Company v. United States*, 200 F. Supp. 944, 948-50 (S.D.N.Y. 1961).

This Court in *Auto Workers v. Scofield*, 382 U.S. 205 (1965), permitted a successful charging party to intervene in a Labor Board review proceeding. The Court analogized

¹³ In review of I.C.C. proceedings, intervention is authorized as a matter of right for any party to the agency proceeding. 28 U.S.C. 2323, 2348.

the intervention provisions of the Hobbs Act with those in the district court under Rule 24, Federal Rules of Civil Procedure, and stated that the policies underlying intervention in the district court may be applicable in appellate courts. 382 U.S. at 280. See also: *United States v. Bursey*, 515 F.2d 1228 (5th Cir. 1975). An intervenor in a district court action is not today subordinate to the claims of a party on whose behalf intervention is made. 4 Moore Fed. P. (2d Ed.) 24.16-17.

A recent court decision, in reviewing an I.C.C. order, allowed an intervenor to broaden the scope of the petition for review. *Widing Transp., Inc. v. I.C.C.*, 545 F.2d 654, 656 (9th Cir. 1976); in another I.C.C. review proceeding an intervening defendant was allowed to raise defenses broader than made by respondent I.C.C. *Chem-Haulers, Inc. v. United States*, 536 F.2d 610 (5th Cir. 1976).

This Court in the *Penn-Central Merger Cases*, 389 U.S. 486 (1968), sustained the requirement that persons broadly attacking the Penn-Central merger and N&W Inclusion cases should intervene in limited review proceedings or suffer dismissal with prejudice. Such parties were not allowed to go forward with independent review actions of their own but were dismissed with prejudice for failure to participate in existing limited review proceedings by way of intervention. *Penn-Central Merger Cases*, 389 U.S. at 504-7, 541-48. See also: *Borough of Moosic v. United States*, 272 F. Supp. 513, 516 (M.D. Pa. 1967); *Erie-Lackawanna Railroad Company v. United States*, 279 F. Supp. 303 (S.D. N.Y. 1967); *Delaware and Hudson Railroad Corp. v. United States*, 279 F. Supp. 311 (S.D.N.Y. 1967); *Erie Lackawanna Railroad Company v. United States*, 279 F. Supp. 313, 316 (S.D.N.Y. 1967).

On the other hand, the Court of Appeals for the District of Columbia Circuit in another proceeding did not permit an intervenor to broaden judicial review of a Civil Aeronautics Board order. Rather, the Court of Appeals allowed the intervenor to file a petition for review out of time. *Air Line Pilots Association International v. C.A.B.*, 514 F.2d 834, 835-36 (D.C. Cir. 1975). However, the authority of the court to extend the period for instituting judicial review of C.A.B. decisions, 49 U.S.C. 1486(a), does not have a counterpart in judicial review of I.C.C. decisions.

The Supreme Court should settle the question of an intervenor's status in judicial review under the Hobbs Act. The matter is of pressing importance.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

ROBERT P. KANE, *Attorney General*
Capitol Annex
Harrisburg, Pa. 17120

BARNETT SATINSKY, *Chief Counsel*
JOHN B. WILSON, *Asst. Counsel*
CANDACE N. KREIGER, *Asst. Counsel*
Penn. Public Utility Commission
P.O. Box 3265
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL, *Spec.*
Asst. Counsel
1100 17th Street, N.W.
Washington, D.C. 20036

APPENDIX A**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

[Filed April 1, 1977]

No. 76-2153

September Term, 1976

Corning Glass Works and Thatcher
Glass Manufacturing Company,
Petitioners

v.

Interstate Commerce Commission and
United States of America,
Respondents

Consolidated Rail Corporation
New York State Department of Transportation
Commonwealth of Pennsylvania and Pennsylvania
Public Utility Commission

Before: Bazelon, Chief Judge and Wright, Circuit Judge

ORDER

Upon consideration of petitioners' motion to dismiss, respondents' supporting memorandum and intervenors' opposition, and it appearing that the only issue properly before the Court is the lawfulness of the cancellation of service at Emira, New York, it is

ORDERED by the Court that the motion to dismiss is granted.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed April 28, 1977]

No. 76-2153 September Term, 1976

Corning Glass Works and Thatcher
Glass Manufacturing Company,
Petitioners,

Interstate Commerce Commission and
United States of America,
Respondents

Consolidated Rail Corporation
New York State Department of Transportation
Commonwealth of Pennsylvania and Pennsylvania
Public Utility Commission

No. 77-1147

Commonwealth of Pennsylvania and
Pennsylvania Public Utility Commission,
Petitioners

v.

Interstate Commerce Commission and
United States of America,
Respondents

Consolidated Rail Corporation
Corning Glass Works & Thatcher Glass Manf. Co.
Before: Bazelon, Chief Judge and Wright, Circuit Judge

ORDER

On consideration of petitioners' petition for rehearing, it is ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed April 1, 1977]

No. 77-1147 September Term, 1976

Commonwealth of Pennsylvania and
Pennsylvania Public Utility Commission,
Petitioners

v.

Interstate Commerce Commission and
United States of America,

Respondents

Consolidated Rail Corporation
Corning Glass Works & Thatcher Glass Manf. Co.

Before: Bazelon, Chief Judge and Wright, Circuit Judge

ORDER

Upon consideration of petitioners' motion to consolidate their petition with No. 76-2153, and in light of the dismissal of No. 76-2153, it is

ORDERED by the Court that the motion to consolidate is dismissed as moot.

Per Curiam

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed December 27, 1976]

CORNING GLASS WORKS
Corning, New York 14830

and

THATCHER GLASS MANUFACTURING COMPANY
Post Office Box 265
Elmira, New York 14902.

Petitioners,

No. 76-2153

v.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Respondents.

JOINT PETITION FOR REVIEW

Come now Corning Glass Works and Thatcher Glass Manufacturing Company, hereinafter referred to as Petitioners, and pursuant to Section 2344 of Title 28 of the United States Code, hereby petition the Court to review the report and order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, entered on October 21, 1976, and served on October 29, 1976, a copy of which is attached hereto as Appendix A. In support thereof Petitioners respectfully state as follows:

In Item 2A of Supplement 1 to Freight Tariff 1, Consolidated Rail Corporation (ConRail) proposed not to adopt any existing tariff provisions applying on trailer-on-flatcar (TOFC) traffic moving from or to TOFC ramps located at 26 specified cities, including Elmira, New York. The effect of that proposal, as pertinent, was to cancel the TOFC service formerly available to and utilized by Petitioners at Elmira. The Interstate Commerce Commission (Commission) suspended that proposal and ordered an investigation into its lawfulness. Petitioners are parties of record and participated in that investigation proceeding.

In its report and order served on October 29, 1976, the Commission, Division 2, with Commissioner O'Neal dissenting, found that the proposed cancellation of TOFC rates at Kalamazoo, Michigan, Huntington, Indiana, and Marion, Ohio, was not shown to be just and reasonable, but that the proposed cancellation at the other 24 designated terminals, including the ramp at Elmira, New York, was just and reasonable. Commissioner O'Neal, dissenting in part, found that the opposition to the cancellation of TOFC rates and services at Elmira, New York and Sharon, Pennsylvania, warranted their continuation as ConRail obligations. Division 2 ordered that ConRail cancel the suspended schedules on or before November 20, 1976, without prejudice to the filing of new schedules in conformity with its findings. ConRail has complied with said order, and TOFC service at Elmira has ceased.

Petitioners filed separate petitions with the Commission seeking reconsideration of Division 2's above report and order on or about November 17, 1976. However, under Section 303(h) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, which amends Section 17 of the Interstate Commerce Act, 49 U.S.C. § 17,

Division 2's report and order was administratively final on the date served, and is now ripe for judicial review. That section provides as follows:

Notwithstanding any other provision of this Act, any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served. A civil action to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought after such date in a court of the United States pursuant to the provisions of law which are applicable to suits to enforce, enjoin, suspend, or set aside orders of the Commission.

II

Section 2343 of Title 28 of the United States Code gives the United States Court of Appeals for the District of Columbia Circuit venue to review orders of the Interstate Commerce Commission.

III

The Commission's decision is unlawful for the following reasons:

(1) Its conclusion that the cancellation of TOFC service at Elmira, New York, was shown to be just and reasonable is not supported by substantial evidence, and is arbitrary, capricious and without a rational foundation.

(2) Its conclusion regarding the cancellation of TOFC service at Elmira, New York, is arbitrary, capricious and not otherwise in accordance with the law in that the Commission fails to apply the very standards it formulated to test the lawfulness of the assailed tariff proposal.

Wherefore, Petitioners respectfully pray that this Court set aside, enjoin and vacate the order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, and grant such other and further relief as it deems necessary and proper.

Respectfully submitted,

/s/ John R. Bagileo
 John R. Bagileo
 918 - 16th Street, N.W.
 Washington, D.C. 20006
 Phone: 202-785-3700

Of Counsel:

Rea, Cross & Auchincloss
 700 World Center Building
 918 - 16th Street, N.W.
 Washington, D.C. 20006

Dated: December 27, 1976

Counsel for Petitioners

APPENDIX E

SERVICE DATE
 OCT 29 1976

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 9108

CANCELLATION OF TOFC SERVICE, CONSOLIDATED RAIL CORPORATION

Decided October 28, 1976

1. Proposed cancellation of TOFC rates at 24 designated terminals in Indiana, Michigan, Ohio, New York, and Pennsylvania found just and reasonable, and otherwise lawful.
2. Proposed cancellation of TOFC rates at Kalamazoo, Mich., Huntington, Ind., and Marion, Ohio, found not shown to be just and reasonable.
3. Schedules ordered cancelled without prejudice to filing of new schedules in conformity with findings herein. Proceeding discontinued.

Richard J. Murphy, for respondent.

Stephen Kalish, Daniel J. Sweeney, Barry Start, John R. Bagileo, Edward J. Klann, Michael J. Seboria, G. Sanford Wilkins, Richard H. Streeter, and Harry E. Andrews for shipper protestants.

Candace N. Kreiger, Gordon P. MacDougall, Richard A. Lidsky, Jr., Diane V. Delevett, John N. Shanks II, and William A. Shapiro for State and Federal agencies.

Thomas P. Shearer for the United Transportation Union, Pennsylvania State Legislative Board.

REPORT AND ORDER OF THE COMMISSION
 DIVISION 2, COMMISSIONERS HARDIN, O'NEAL,
 AND CHRISTIAN
 BY THE DIVISION:

This proceeding is an investigation into the lawfulness of certain portions of a tariff adoption notice filed by the Consolidated Rail Corporation (ConRail). The notice, designated formally as Consolidated Rail Corporation Tariff ICC No. 1, is the instrument by which ConRail has adopted the pertinent tariff routes, rates, and regulations of its predecessor railroads to govern its operations commencing on April 1, 1976, pursuant to the Regional Rail Reorganization Act of 1973 (RRRA), 45 U.S.C. 701. Tariff No. 1 was designed to conform generally to the operations and properties structured for ConRail operation in a plan issued by the United States Railway Association (USRA) pursuant to the RRRA. That plan, designated as the "Final System Plan", has been approved by the Congress.

As pertinent here, the ConRail adoption tariff stated a number of specific exceptions from the tariff provisions being adopted. By one of these exceptions, ConRail did not adopt trailer-on-flatcar (TOFC) rates to or from 31 designated TOFC terminals formerly operated by the Penn Central Transportation Company, the Erie Lackawanna Railroad Company, the Reading Railway System, and the Lehigh Valley Railroad in the States of Indiana, Michigan, Ohio, New York, and Pennsylvania.

The effect of this exemption was to cancel the provisions of TOFC service at the designated TOFC terminals. Upon consideration of numerous protests against the proposed cancellations, the Commission, Division 2, by an order served March 31, 1976, suspended the operation of the tariff to

the extent it affected 27 of the 31 TOFC terminals. By the terms of the Commission order, the suspension is effective to, and including October 31, 1976, unless otherwise ordered by the Commission.

A public hearing concerning this proposal was conducted for the Commission by an Administrative Law Judge on May 26 and 27, 1976. Post-hearing briefs were filed on July 15, 1976, by respondent, and by the Commonwealth of Pennsylvania and its Public Utility Commission; the Office of Public Counsel of the Interstate Commerce Commission; the Kalamazoo County Chamber of Commerce, Brown Company, Clark Equipment Company, Eaton Corporation, Kellogg Company, Simpson Lee Paper Company, and Upjohn Company, jointly; Maryland Port Administration; Corning Glass Works; and the Whirlpool Corporation. Due and timely execution of our functions under the Interstate Commerce Act imperatively requires omission of an initial decision by the Administrative Law Judge.

Background and Jurisdiction

ConRail came into existence pursuant to the provisions of the Regional Rail Reorganization Act of 1973. It began its operations as a railroad on April 1, 1976. As pertinent here, the 1973 legislation provided a special statutory basis and procedure for establishment of a new corporate entity, ConRail, to acquire and operate the railroad properties of the then bankrupt railroads of the Northeast and Midwest. The Act provided for a complex planning process placing specific responsibilities with the Department of Transportation, the Interstate Commerce Commission, and the United States Railway Association, with a specific timetable for implementation of the pertinent plans. At the final stage of that planning process, the USRA issued a "Final System

Plan" on July 26, 1975. A Supplement to the Final System Plan was issued by the USRA on September 18, 1975. As provided in the RRRA, the final system plan issued by USRA was deemed approved by the Congress in the absence of Congressional action to disapprove the plan within the prescribed time period.

Section 301(b) of RRRA provides that ConRail shall be deemed a common carrier by railroad under section 1(3) of the Interstate Commerce Act, subject to the provisions of the Interstate Commerce Act. On the other hand, section 601(b) of the RRRA provides that the provisions of the Interstate Commerce Act are inapplicable to those actions taken under the RRRA itself in the process of formulating and implementing the Final System Plan.

Although it previously had contended that this Commission lacked statutory jurisdiction to suspend or adjudicate the proposed changes in TOFC services, as provided in its Tariff No. 1, ConRail on brief specifically concedes that jurisdiction and it recognizes that the provisions of the Interstate Commerce Act govern the proposals in issue. Protestant parties and the RSPO argue strongly on brief that the Commission has jurisdiction to consider the merits of the ConRail proposal, and that the Commission should exercise that jurisdiction. The participation of RSPO was directed solely to that issue. In the light of the fact that ConRail now concedes jurisdiction, there is no necessity for an extended discussion of that question, and it will suffice here to find that ICC jurisdiction does lie to consider the merits of the matters in issue in this proceeding.

The ConRail Justification

ConRail handles more TOFC traffic than any other railroad in the country, with its traffic representing approxi-

mately 40 percent of the national TOFC market. In the East, its TOFC operations comprise about 85 percent of the TOFC market.

ConRail avers that it wants to compete aggressively for TOFC traffic, and that specific management objectives include expansion of its TOFC business. It points out that the USRA financial forecast of viability for ConRail in the Final System Plan was predicated, among other things, on a forecast of growth in its intermodal traffic. ConRail management, however, believes that its present TOFC route and terminal structure is too unwieldy and inefficient, and that this structure should be shaped along the lines stated in the USRA'S September 1975 Supplement to the Final System Plan. In performing its piggyback services, ConRail presently operates a total of 85 TOFC terminals, including the 27 terminals in issue in this proceeding. Should the present proposal become effective, its TOFC operations would be performed through 36 "physical" and 22 "satellite" TOFC terminals. A "physical" terminal, in this context, is one at which trailers are loaded directly onto flatcars at track sidings. Trailers accepted for TOFC transportation by ConRail at "satellite" terminals are moved by ConRail over the highway to physical terminals for loading onto piggyback trains.

The portion of the September 1975 Supplement to the Final System Plan on which ConRail here relies for its conceptual approach to the proposed reduction of TOFC terminals states as follows:

"Route Structure. The proposed ConRail intermodal operating plan envisions a substantial reduction in route miles. The route structure would be limited to major freight corridors with service on additional routes provided by connecting con-

ventional train services This plan would concentrate traffic flows over a core network, minimizing the route mileage that must be upgraded and maintained for high-speed (60 m.p.h.) operations.

"The restructured system would continue direct service to all major ConRail market areas. Increased coordination with connecting railroads would improve service to points outside the Region and would lead to the development of an efficient interregional intermodal network.

"The Association's plan includes a number of specific coordinations and intermodal market exchanges, including the following:

<u>Market</u>	<u>R: commendations</u>
Elkhart, Ind.	N&W to serve South Bend.
Ft. Wayne, Ind.	N&W to serve.
Huntington, Ind.	N&W to serve.
Lima, Ohio	N&W to serve.
Louisville, Ky.	ConRail to interchange traffic to and from East with L&N at Cincinnati; L&N to handle all remaining traffic.
Kalamazoo, Mich.	Chessie to service markets from Benton Harbor and Grand Rapids.
Cincinnati, Ohio	ConRail to negotiate coordinated terminal operations with the L&N and/or Southern.
Wilkes-Barre, Pa.	D&H establishing a terminal in Yatesville to serve region.

New York-Washington Amtrak to provide all Railway Post Office and "head end" mail service.

"Terminals. ConRail would continue to operate 26 terminals and would serve 21 principal market areas A total of 21 terminal facilities will be closed or consolidated under the proposed operating plan, as shown below.

Intermodal Terminals

<u>Present operator</u>	<u>Present</u>	<u>Proposed</u>	<u>Proposed operator</u>
Penn Central	35	23	ConRail
Lehigh Valley	4	1	ConRail
Erie Lackawanna	19	13	Chessie ¹
CNJ	2	2	ConRail
Reading	8	8	Chessie
Total	68	47	

¹ The Association's estimate of intermodal terminals which Chessie may wish to operate." (FSP, Supplemental Report of September 18, 1975, pp. 38-39).

That Supplemental Report also provides:

"Incorporating Erie Lackawanna and Reading intermodal traffic into Unified ConRail would cause relatively few changes to the route and terminal structure developed for the FSP recommended system. Intermodal traffic of these two roads accounted for approximately \$40 million in revenues in 1973 and involved 228,000 loaded trailers (including some which are interchanged with the Penn Central, Lehigh Valley and the

Central of New Jersey). The Association developed an operating plan that incorporated approximately 80 percent of this traffic. The same general criteria were used in evaluating those traffic flows recommended for retention, including relative profitability, traffic balance and volumes. These additional traffic flows could be accommodated under Unified ConRail by incorporating two additional facilities — the Reading terminal in Philadelphia and the Erie Lackawanna terminal at Croxton, N.J. All other major traffic generating points would be served from terminals to be retained under the FSP recommended system." (p. 112)

In general, ConRail emphasizes that its TOFC business is essentially service-sensitive, and that it must be free to shape its TOFC operations to meet service competition of motor carriers. It plans to center its TOFC service, therefore, around the operation of dedicated intermodal trains, through trains running directly between TOFC terminals, avoiding yards and intermediate classifications, and avoiding use of trains that stop off and set off cars at intermediate points. Otherwise, ConRail believes, its TOFC operation would be comparable with boxcar service, and unable to meet faster highway competition. Thus, ConRail intends basically to concentrate its TOFC services on operations between major markets which can provide the high volumes of traffic to justify through trains dedicated to TOFC service.

ConRail has been operating approximately 20 "TV" symbol trains, or trailvan trains, the special through trains dedicated to TOFC service, daily in each direction, eastbound and westbound, since taking over the operations of the bankrupt Northeastern railroads. Occasionally, when volumes jus-

tify, additional sections of TV trains, or even additional special trains, are added to the regular TV schedules. About 95 percent of ConRail's TOFC traffic moves on the TV symbol trains.

During calendar year 1975, the railroads now absorbed into the ConRail structure handled a total of 627,694 revenue loaded trailers in TOFC service inbound to points on their systems, and 604,711 revenue loaded trailers outbound. The following table provides a breakdown of those totals by carrier. It also shows total volumes handled by each system at the terminals proposed to be closed pursuant to the tariff in issue here. Omitted from the table are volumes handled (a) at the 8 TOFC terminals located in those cities where ConRail would continue to operate other TOFC terminals, as discussed in detail below; and (b) at Huntington, Ind., where ConRail has agreed to operate its TOFC terminal pursuant to a contractual agreement with the State of Indiana.

Comparison of Revenue Loaded Trailers
(Inbound and Outbound)
At Affected Terminals with System
Year 1975

	System		Specified Terminals	
	Inbound	Outbound	Inbound	Outbound
Penn Central	450,635	451,208	2,208	6,171 ¹
Erie-Lackawanna	111,641	115,817	12,521	16,088 ²
Reading	15,771	8,566	812	1,488 ³
Lehigh Valley	36,530	20,058	749	351 ⁴
Central of New Jersey	13,117	9,062	—	—
Totals	627,694	604,711	16,290	24,098

¹ Former Penn Central Terminals

	Inbound	Outbound
Benton Harbor, Mich.	16	567
Grand Rapids, Mich.	301	1,040
Kalamazoo, Mich.	789	2,462
Fort Wayne, Ind.	989	1,341
South Bend, Ind.	113	761
Totals	2,208	6,171

² Former Erie-Lackawanna Terminals

	Inbound	Outbound
Akron, Ohio	1,395	2,132
Binghamton, N.Y.	682	450
Elmira, N.Y.	423	975
Lima, Ohio	102	732
Marion, Ohio	3,232	3,927
Port Jervis, N.Y.	4,123	2,150
Scranton, Pa.	2,078	4,875
Sharon, Pa.	176	589
Utica, N.Y.	310	258
Totals	12,521	16,088

³ Former Reading Terminals

	Inbound	Outbound
Reading, Pa.	444	891
Hershey, Pa.	25	135
Swedeland, Pa.	343	462
Totals	812	1,488

⁴ Former Lehigh Valley Terminals	Inbound	Outbound
Wilkes Barre, Pa.	749	351

As this table demonstrates, the affected stations (those at which there is not merely an elimination of duplication) handled but a small portion of the TOFC traffic of the railroads whose lines are components of ConRail.

ConRail has presented specific justifications for closing each of the TOFC terminals in issue. Eight of those terminals are located at "common points" where ConRail will continue to operate a TOFC terminal. The other proposed closings would mean the end of ConRail TOFC service in the affected communities, although in several instances other railroads would continue to operate TOFC facilities there.

A. *Common point terminals.* There are eight terminals in this category, and ConRail emphasizes as to them that their closings will not deprive any community of ConRail TOFC service.

1. *Buffalo, N.Y.* The properties taken over by ConRail at Buffalo include TOFC terminals formerly operated by the Erie Lackawanna Railroad Company and the Penn Central Transportation Company. ConRail proposes to discontinue TOFC service at the Erie Lackawanna facility and to continue operations only at the Penn Central terminal. The Penn Central ramp is approximately 1,000 feet from that of the Erie Lackawanna, and the latter is located on private property. The former Penn Central terminal has multiple dedicated intermodal train service, TV symbol trains, available on a daily basis. ConRail's preliminary investigation showed average monthly volumes of the former Erie Lackawanna terminal as approximately 100 per month inbound and outbound, with a 50 percent empty ratio.

2. *Niagara Falls, N.Y.* There are two TOFC ramps at this location which ConRail proposes to close, a terminal formerly operated by the Erie Lackawanna (the traffic of which has been moved by ConRail over the highway to the physical ramp at Buffalo) and a physical ramp operated by the former Lehigh Valley. A satellite TOFC terminal (Penn Central) in the vicinity, at Suspension Bridge, will continue to be operated by ConRail. All of the traffic of this area will be handled over the ConRail physical ramp at Buffalo.

3. *Syracuse, N.Y.* The ConRail proposal involves closing of the former Erie Lackawanna TOFC terminal at Syracuse. This terminal is located 5 miles from the former Penn Central piggyback ramp, where there is ample capacity and service to handle the volumes formerly tendered to the Erie Lackawanna ramp. That traffic averaged approximately 100 trailers per month, with twice as many trailers inbound as outbound. Requiring ConRail to handle piggyback traffic to or from eastern territory locations via the Erie Lackawanna ramp at Syracuse would add 2 to 3 days transit time, compared with second-morning service over the former Penn Central ramp, because that traffic would be handled in regular mixed freight train service.

4. *Cleveland, Ohio.* The ConRail proposal here also is to close the former Erie Lackawanna TOFC terminal, which is located about 7 miles from the former Penn Central piggyback ramp, which would be continued in operation. The traffic volume formerly handled over the Erie Lackawanna ramp averaged approximately 200 trailers per month, with a high degree of empty return on the outbound shipments. ConRail avers that there is ample capacity and service available at the former Penn Central ramp at Cleveland to handle the former Erie Lackawanna volumes. Also, it states, transit time from or to the Penn Central ramp will be substantially

better in the dedicated intermodal trains to be serving that ramp, than that available in the conventional freight train service to be provided over the Erie Lackawanna trackage.

5. *Allentown, Pa.* The properties taken over by the ConRail at Allentown included two ramps operated by the former Lehigh Valley Railroad and the Reading Company. It is the ConRail proposal to continue to operate the Lehigh Valley terminal and to close the Reading terminal, which is located approximately 2 miles away. The volumes of the former Reading Company at Allentown were approximately 45 trailers per month with a high empty return ratio, approximately twice as many outbound as inbound shipments.

6. *Harrisburg, Pa.* The TOFC terminals of the Penn Central and the Reading Company are located approximately 3 miles apart at Harrisburg. It is the proposal of ConRail here to close the Reading terminal and to continue operations at the Penn Central terminal. Approximately 100 trailers per month were handled via the Reading terminal, with a substantial imbalance of movements, approximately one-third more outbound than inbound shipments.

7. *Lancaster, Pa.* The railroad properties taken over by ConRail at Lancaster include TOFC ramps of the Penn Central and the Reading Company, located about 3 miles apart. ConRail proposes to continue to provide TOFC service from the Penn Central ramp, operated as a satellite terminal, with substituted highway service to and from Harrisburg for connection there with intermodal trains. Direct rail service from Lancaster would involve mixed freight train service to Enola, Pa., and thence beyond also in regular train service.

B. Terminal closings at other communities.

1. *Benton Harbor, Mich.* The former Penn Central ramp is presently operated as a satellite TOFC terminal, with sub-

stituted highway service provided to and from Kalamazoo, Mich., a round-trip distance of 98 miles. That operation involves an average drayage cost of \$78 per loaded trailer. During the first four months of 1976, there were 22 trailers inbound and 118 trailers outbound from this location, or a five to one imbalance. During calendar year 1975 there were only 16 trailers received inbound at Benton Harbor, compared with a total of 567 trailers being moved outbound from that ramp. The Chesapeake & Ohio Railway system maintains a "physical" TOFC ramp operation at Benton Harbor, and it is ConRail's contention that the Benton Harbor area's piggyback market should be conceded to the Chessie system, allowing it to absorb the former Penn Central TOFC traffic there. The major user of ConRail TOFC service at Benton Harbor is the Whirlpool Corporation, which has indicated to ConRail a willingness to truck its own TOFC traffic to and from the ConRail ramp at Elkhart, Ind., provided ConRail would continue its TOFC operation at that point. ConRail plans to do so, and believes that it can provide much better service from Elkhart.

2. *Grand Rapids, Mich.* Prior to April 1, 1976, the former Penn Central terminal at Grand Rapids was operated by that carrier as a satellite terminal, with its TOFC traffic trucked to and from Kalamazoo, Mich., at a round-trip drayage cost of \$78 per trailer. When the Kalamazoo operation was converted by ConRail into a satellite terminal, management decided to convert the Grand Rapids operation to a physical terminal, with its TOFC traffic handled in conventional freight train service to Elkhart, Ind., for connection there with dedicated TOFC trains. The present TOFC service from Grand Rapids to Boston, Mass., or New York, N.Y., is scheduled for 5th morning arrival. During the first 4 months of 1976 Grand Rapids received a total of 41 trailers in piggyback operations, and shipped 94 trailers outbound,

greater than a 2 to 1 imbalance. In 1975 there were 301 trailers received at Grand Rapids in piggyback operations, and 1,040 trailers shipped outbound. ConRail points out that the Chessie system operates a piggyback ramp at Grand Rapids from which continued piggyback service would be available in this community.

3. *Port Jervis, N.Y.* The former Erie Lackawanna TOFC terminal at Port Jervis which ConRail proposes to close was used almost exclusively as a pickup and drop point for United Parcel Service traffic moving to and from its New England distribution centers. Prior to April 1, 1976, most of the outbound traffic from Port Jervis had already been diverted from this Erie Lackawanna location when the Penn Central established a through dedicated TOFC train originating at Springfield, Mass. The eastbound traffic from Chicago and other western origins formerly terminating at Port Jervis has also been transferred to other ConRail piggyback service. During 1975 a total of 4,123 inbound trailers were received at the Port Jervis TOFC terminal, and a total of 2,150 trailers were moved outbound.

4. *Utica, N.Y.* The TOFC ramp proposed to be closed here by ConRail also is a former Erie Lackawanna piggyback ramp. The average monthly volumes handled through this TOFC terminal were approximately 25 trailers inbound and outbound, with a like number of empty trailers. Utica is approximately 49 miles east of Syracuse, the nearest ConRail ramp which would remain in operation. If regular freight trains are used to and from Utica for TOFC operations, the service provided would be fifth-morning deliveries to Chicago and fourth-morning deliveries to Croxton, N.J. ConRail avers that such service would not be competitive with available motor carrier service. In comparison, TOFC service offered by ConRail from Syracuse holds out second-morning delivery to Chicago.

5. *Hershey, Pa.* The former Reading Company TOFC ramp proposed to be closed here is located approximately 14 miles from Harrisburg, where ConRail piggyback service would continue to be offered. During 1975, a total of 25 trailers were received at the Hershey piggyback ramp, and a total of 135 trailers were shipped outbound.

6. *Swedeland, Pa.* The former Reading Company ramp proposed to be closed here is located on private property of the Allen Wood Steel Company in the Philadelphia metropolitan area. It is operated by the Upper Merion and Plymouth Railroad, a wholly-owned subsidiary of the Allen Wood Steel Company. ConRail's justification for the proposed closing here is that this operation involves low volume (approximately 10 to 20 trailers per month inbound and 5 to 10 trailers per month outbound), traffic imbalance, and the need for use of special equipment. Alternate dedicated piggyback service will continue to be available from ConRail in the Philadelphia area via the former ramps of the Reading Company (at Erie Avenue) and the Penn Central (at Aramingo).

7. *Wilkes-Barre, Pa.* The TOFC ramp proposed to be closed here is one formerly operated by the Lehigh Valley, which previously had handled up to 100 to 150 trailers per month. However, ConRail avers that this traffic has now been diverted to the Delaware and Hudson, which established a new piggyback ramp in this area at Yatesville, Pa., approximately 10 miles from the Wilkes-Barre ramp. Since Wilkes-Barre is at the eastern portion of the ConRail system, TOFC service is primarily of interest for movement to the west. ConRail's present service west from Wilkes-Barre to Buffalo for delivery to the Norfolk and Western there is fourth-day, which ConRail avers is not competitive with the faster D&H schedule.

8. *Fort Wayne, Ind.* ConRail proposes to close the former Penn Central piggyback ramp at this location on the ground that it has handled low volumes, is faced with substantial traffic imbalances, and shows an apparent lack of potential for improving those factors, even with dedicated intermodal train service. ConRail believes that the piggyback market here should be handled over the Norfolk and Western TOFC ramp at Fort Wayne, located approximately 6 miles east of the ConRail ramp, as recommended in the Final System Plan issued by the USRA. During the first four months of 1976, average inbound traffic was 71 trailers per month and average outbound traffic was 93 trailers per month. During calendar year 1975, a total of 989 trailers were received inbound at this facility and a total of 1,341 were shipped outbound. A terminal profit and loss statement for the Penn Central operation in 1975 indicates that the Fort Wayne TOFC operation resulted in an average loss of \$1,833 monthly, and that the terminal operated at a deficit 7 out of the 12 months of the year.

9. *Huntington, Ind.* The former Erie Lackawanna terminal here has been reopened, and it is ConRail's intention to continue this operation under a rail service continuation subsidy agreement with the Public Service Commission of Indiana. The subsidy makes it possible for ConRail to operate this ramp, with regularly scheduled freight train service. As long as the present agreement is in effect, ConRail has no plan to discontinue TOFC service to and from the Huntington ramp.

10. *South Bend, Ind.* The former Penn Central TOFC ramp proposed to be closed by ConRail here is a satellite operation, with its traffic being handled in substituted service via the physical ramp at Elkhart, Ind., a distance of 17 miles. The expense for this highway movement, as

absorbed by the railroad, is \$56 per trailer. During the first 4 months of 1976, the average monthly volumes at South Bend were 71 trailers inbound and 111 trailers outbound, or a total monthly average of 182 loaded trailers. During 1975, the South Bend terminal received 113 inbound loaded trailers, and shipped 761 trailers outbound.

11. *Kalamazoo, Mich.* During 1975, the former Penn Central TOFC terminal here which ConRail proposes to close received 789 loaded trailers inbound, and shipped outbound 2,462 trailers. During the first four months of 1976 the pertinent totals were 74 trailers inbound and 197 trailers outbound per month, approximately a 3 for 1 traffic imbalance. ConRail proposes to continue to provide TOFC service at its ramp at Elkhart, Ind., where dedicated through train piggyback service would be available on a regular basis.

Until February 16, 1976, Kalamazoo was a scheduled service point on Penn Central's symbol TOFC train, TV 16. Until that time TOFC traffic to and from the satellite ramps at Grand Rapids and Benton Harbor was moved over the highway to and from the physical ramp at Kalamazoo. When Penn Central discontinued TV 16 scheduled service at Kalamazoo, because of traffic imbalances and declining traffic volumes, ConRail avers Penn Central then substituted Grand Rapids as a physical TOFC terminal, in connection with its train GRI-5, operating in regular boxcar freight service. Thereafter, Kalamazoo TOFC service has been provided as a satellite operation, with trailers transferred by highway to the Grand Rapids ramp.

ConRail advances its concept of "market consolidation" for this area, contending that while traffic and operating factors justify its closing of the Kalamazoo ramp, shippers in this area will continue to have nearby TOFC service from the Chessie System at Benton Harbor and Grand Rapids

(highway distances of about 55 miles from Kalamazoo), or from ConRail at Elkhart, a distance of 56 miles.

12. *Binghamton, N.Y.* The former Erie Lackawanna terminal here which ConRail proposes to close handled an average monthly volume of 32 trailers inbound and 23 trailers outbound during the first 4 months of 1976. During calendar year 1975 the pertinent totals were 682 trailers inbound, and 450 trailers outbound. ConRail avers that the Delaware and Hudson has initiated a strong sales and marketing campaign seeking increased piggyback traffic on their road, with new TOFC ramps available on the D&H at Binghamton and Wilkes-Barre. ConRail maintains that low volumes in this area do not justify its operation of a TOFC ramp at Binghamton. Binghamton TOFC service now is provided by ConRail as a satellite operation to and from Scranton, a distance of 112 miles.

13. *Elmira, N.Y.* ConRail here proposes to close the TOFC ramp of the former Erie Lackawanna at Elmira. This facility handled an average of 19 trailerloads inbound and 62 trailerloads outbound monthly during the first four months of 1976. For calendar year 1975 the Elmira ramp received a total of 423 inbound trailers and shipped outbound a total of 975 trailers. Prior to April 1, 1976, Erie Lackawanna handled this to and from Elmira. ConRail since then has been operating the Elmira terminal as a satellite, moving the piggyback traffic over the highway to the Scranton, Pa., ramp, a round-trip distance of 254 miles. That highway operation requires a 10-hour round trip at a cost of \$135 per trailer. On service to Chicago from Elmira, the total elapsed time was expected to average 6 or 7 days duration. ConRail does not believe that such service can be competitive with available highway transportation. The Binghamton TOFC ramp of the Delaware and Hudson rail-

road is located some 55 miles from Elmira. ConRail holds out second-morning ramp delivery in Chicago from Syracuse, Buffalo, and Rochester in its dedicated TOFC train schedules. These points are 91 miles, 144 miles, and 97 miles, respectively, from Elmira.

14. *Akron, Ohio.* ConRail proposes to close the former Erie Lackawanna TOFC ramp at Akron, located approximately 30 miles southeast of Cleveland, Ohio. During the first four months of 1976, the average monthly traffic totaled 70 loads inbound and 156 loads outbound through the Akron TOFC facility. During calendar year 1975, the Akron terminal received 1,395 inbound trailers and shipped outbound 2,132 trailers. ConRail avers that the present freight train service between Akron and major freight terminals throughout the system is at least twice as long as service to and from the ConRail terminal at Cleveland, which provides second-morning service through the system. ConRail believes that the Cleveland TOFC terminal could easily absorb the Akron business. ConRail also points out that the Chessie system will continue to have a TOFC ramp at Akron.

15. *Lima, Ohio.* During the first four months of 1976, inbound traffic received at the Lima facility averaged 6 loads monthly, with outbound traffic totaling 24 loads per month. During calendar year 1975 a total of 102 shipments were received at the Lima TOFC facility and 732 trailers were shipped outbound. Since taking over this former Erie Lackawanna terminal, ConRail has been draying the piggyback traffic to the physical ramp at Marion, Ohio, a round-trip distance of 112 miles with a drayage cost of \$90 per trailer. The Norfolk and Western railroad has a TOFC ramp at Lima, which, ConRail contends, could easily absorb this traffic.

16. *Marion, Ohio.* The TOFC ramp facility proposed to be closed at Marion is located on the former Erie Lackawanna railroad. It was predominantly used as a drop and pickup point for United Parcel Service traffic. During calendar year 1975, the Marion facility received a total of 3,232 trailers inbound, and it shipped outbound 3,927 trailers in TOFC service. Since that time, however, the United Parcel Service traffic has been diverted to other ConRail ramps and to dedicated piggyback train service, and the traffic volumes at Marion have been reduced substantially. ConRail points out that elapsed time on present freight train service from Marion to major markets on the ConRail system is approximately twice as long as the through train piggyback service available from the ConRail TOFC ramp at Columbus, located some 46 miles from Marion.

17. *Reading, Pa.* ConRail proposes to close the former Reading Company TOFC ramp at Reading. The revenue handled at that ramp for the first four months of 1976 averaged 19 loads inbound and 54 loads outbound monthly. During calendar year 1975, the Reading TOFC ramp facility received 444 inbound trailers and shipped outbound 891 trailers. ConRail believes that this traffic could be handled readily at its piggyback facilities at Harrisburg or Allentown, which are 51 and 40 miles respectively from Reading. The service to and from ConRail system points over the Harrisburg ramp would be performed at approximately one-half the transit time presently required to and from the Reading ramp.

18. *Scranton, Pa.* The TOFC ramp proposed to be closed here is located on the trackage of the former Erie Lackawanna Railroad. ConRail has operated this as a consolidating point serving several satellite stations, including Elmira. United Parcel Service formerly used this ramp as a

major drop point for traffic originating at Allentown, Pa., for westbound movement. ConRail has now provided United Parcel with similar service at its Harrisburg ramp, and the customer is no longer interested in using the Scranton facility. While some of the former Erie Lackawanna TOFC operated through Scranton prior to April 1, 1976, ConRail has not used this route since then for its piggyback trains, deciding to use alternate trackage at Port Jervis. A second major customer of the Erie Lackawanna at Scranton has advised ConRail that it will use the new piggyback facility of the D&H at Wilkes-Barre instead of the ConRail TOFC ramp at Scranton.

19. *Sharon, Pa.* The TOFC terminal proposed to be closed here also is located on the property of the former Erie Lackawanna railroad. During the first four months of 1976, average monthly volume at Sharon was 11 trailers inbound and 35 trailers outbound. ConRail points out that Sharon is located on the interstate highway system, and that substantial motor carrier competition is available for Sharon traffic. During 1975, a total of 176 trailers were received at Sharon and 589 trailers were shipped outbound. ConRail has alternate intermodal TOFC facilities available at Cleveland or Pittsburgh, distances of 55 and 81 miles respectively from Sharon. In addition, the Chessie system operates a terminal at Youngstown, Ohio, approximately 14 miles from Sharon.

Cost Evidence. ConRail presented a cost computation intended to show the fully allocated and variable costs per trailer from and to selected ConRail system terminals in Plan II½ TOFC operations, the plan predominantly in use at the ramps involved in this proceeding. The study also shows the revenues generated per trailer pursuant to the rates applicable on such movements. Eleven of the TOFC

terminals here involved are represented in the study, which shows movements to or from such key markets or gateways as Baltimore, Md., Chicago, Ill., and Kearney, N.J. For example, the study shows per trailer variable costs of \$463.12, and fully allocated costs of \$546.45, on shipments from the Kalamazoo ramp to Baltimore, compared with earned revenue at the minimum weight levels of \$398.50. On shipments to Kearney the study shows \$489.74 as the variable costs, and \$577.74 as the fully allocated cost, compared with revenue of \$446.50.

The study purports to show a pattern of non-compensativeness on the point-to-point movements which were costed, but on examination we find the study to have no probative value in deciding the issues presented in this proceeding.

The unit costs employed in that study are based primarily on Penn Central's transportation expenses for calendar year 1974, by the use of Rail Form A. These unit costs were then adjusted by wage and price indexes to April 1, 1976, levels. Certain factors, such as car costs and tie and untie costs, are more current, but they too are Penn Central costs.

While we recognize, of course, that ConRail, coming into existence as an operating carrier only on April 1, itself had no historical system cost data upon which to base its cost calculations, the cost study gives no significant effect to operating changes under the new management, nor any rationalization for why relevant adjustments are not incorporated into the study. It would be unrealistic to assume that, contrary to the objectives of the Regional Rail Reorganization Act, ConRail is not achieving significant new economies in its operating expenses compared with those of Penn Central in 1974.

Moreover, in a proceeding of this nature and scope, a more pertinent inquiry would be to ascertain the costs which would be avoided upon reduction of the ConRail services to the levels proposed. A pro forma revenue and cost per trailer comparison for an arbitrarily selected group of point-to-point movements, such as that prepared by ConRail, fails to present a reliable, or even plausible, indicator of the appropriate dollar and cents consequences of the proposal.

EVIDENCE IN OPPOSITION TO THE PROPOSAL

Testimony was presented on behalf of the New York State Department of Transportation to the effect that the State is greatly interested in preserving an adequate level of transportation, including TOFC service, for the shipping public at the affected communities in New York. It emphasizes that the ICC should base its decision in this proceeding on its impact for the total transportation system involved, not merely on whether certain TOFC ramp closings were subject to specific shipper protests. The State supports in principle the concept that unnecessary and duplicative TOFC facilities of ConRail should be consolidated.

Wheatland Tube Company of Philadelphia, Pa., manufactures about 17,500 tons of steel pipe, conduit, and tubing, in various sizes, at its plant in Mercer County, Pa., about 3 miles from the ConRail TOFC ramp at Sharon and about 14 miles northeast of Youngstown, Ohio. It has 17 customers who call for TOFC shipments of its products in the ConRail service area: four of these customers are in the Chicago area and they received 560,240 pounds, or about 14 TOFC loads, in 1975; five of them are in the Boston, Mass., area, and they received 1.3 million pounds, or about

32 trailerloads in 1975; and eight are located in the New York City area and they moved about 805,655 pounds, or about 20 loads, in 1975. These shipments require flat-bed trailers. In the past this shipper also used TOFC service to customers in midwestern and southwestern States but that traffic was diverted to the highway carriers, shipper asserts, because of poor rail service, lack of equipment, and a decision of the Erie Lackawanna, which had originated the traffic at Sharon, to keep its flat-bed trailers on its own line.

The Wheatland distribution manager stated:

We have surveyed the alternate railroad piggy-back ramps outside the Sharon area. Another company in the Sharon area requiring flat-bed equipment has advised it takes 6 to 7 days lead time to receive a flat bed at the C&O in Youngstown. The C&O would not do us too much good, irrespective of their lead time, as they have no routes to our principal market in Boston. All other piggyback ramps are too far to reach.

The Picture Tube Division of RCA operates the world's largest color picture tube manufacturing plant at Marion, Ind. It expresses great concern about the ConRail proposal to end TOFC service at Fort Wayne, Ind. RCA points out that it already has been adversely affected by the ConRail takeover in the Northeast, because of the resulting abandonment of a branch line of the Erie Lackawanna between Hammond, Ind., and Lima, Ohio.

During 1975, Erie Lackawanna operated a TOFC ramp at Huntington, about 31 miles from the RCA plant. RCA used the Huntington ramp almost exclusively for its 1975 export shipments. The Fort Wayne ramp is 52 miles from

RCA's Marion plant. The alternative ConRail TOFC service for RCA if the Huntington and Fort Wayne ramps are closed would be Indianapolis, about 75 miles distant. RCA has declined to use a still available ConRail TOFC satellite ramp at Marion, Ind., because service there was not considered flexible or responsive. At rate levels current at the time of the hearing for the volume then being shipped, the additional cost to RCA for use of the Indianapolis ramps would be approximately \$50,000 annually. During the first 4 months of 1976, RCA shipped 373 TOFC trailer units. Its inbound TOFC volume has been negligible.

Whirlpool Corporation of Benton Harbor presented testimony in opposition to the proposed closing of the ConRail ramp at Marion, Ohio. That plant shipped a total of 2,517 piggyback truckloads of its products from Marion over the Norfolk and Western and the Erie Lackawanna during 1972; 1,080 trailerloads in 1973; 440 trailerloads in 1974; and 545 trailerloads in 1975. Until late 1974, the Norfolk and Western was handling about 70 percent of that traffic but between October 1974 and May 1975, Norfolk and Western canceled its TOFC rates from Marion and, by 1975, Norfolk and Western had been handling only a minimal portion of this traffic.

At the present time, Whirlpool pays a local cartage carrier \$12.19 to move its trailers between its plant and the ConRail facility at Marion. If the Marion ramp is closed as ConRail has proposed, the costs for Whirlpool to transport its trailers between Marion and the ConRail ramp at Columbus, Ohio would be 81 cents per mile at 100 miles round trip, or \$81 per trip. This would represent what Whirlpool refers to as a penalty of \$68.81 per trailer. Assuming traffic volume on the scale handled in 1975, Whirlpool would face an additional cost of nearly \$35,000 annually. It contends that

such a consequence will place a serious financial strain on its interstate rail traffic and that it would have to consider initiation of private carriage. In addition, Whirlpool points out that it is expanding its plant at Marion, which could lead to an annual traffic volume of as many as 7,500 TOFC trailers and 1,000 rail cars. Expansion to reach this objective at this plant, with an estimated building cost of \$10 million, is now in progress.

Eaton Corporation of Cleveland, Ohio, a major diversified multinational manufacturer, produces truck transmissions at its Kalamazoo plant, which employs 1,200 persons and has an annual payroll in excess of \$15.5 million. The transmissions are marketed overseas as well as throughout North America. It strongly opposes the ConRail effort to close the Kalamazoo TOFC ramp. The Kalamazoo plant received 113 containers of imported steel castings during the first quarter of 1976, and Eaton is confident that this flow of traffic is on the increase, expecting the total of inbound containers to reach 500 units for calendar year 1976. Eaton's immediate projections for the movement of these transmissions in 1976 are of more than 17 million pounds of traffic, generating TOFC freight revenues for ConRail of about \$171,750 at rate levels in effect at the time of the hearing. Projections through 1977 are for an increase of about 45 percent in this traffic volume, to a rate of about 720 trailers per year.

Eaton's use of container service from Baltimore to Kalamazoo is not a recent development. The transmission division here has been receiving imported castings by this form of transportation for over 3 years. In addition to the inbound tonnage, the Kalamazoo plant also ships transmissions and parts through the ports of Baltimore and New York to various overseas destinations. In the

past these outbound shipments have been moving to the ports by motor common carriers. However, on April 28, 1976, this Kalamazoo facility forwarded its first TOFC trailer container to the port of New York for overseas movement. A second trailer was shipped on May 4, also destined to move through the port of New York. The rail transit time was satisfactory on these movements. If the contents of the containers arrive at their foreign destinations in good condition, Eaton is confident that the use of TOFC service on export traffic can be greatly expanded.

If the ConRail piggyback ramp at Kalamazoo is closed, Eaton will probably divert the import Baltimore-Kalamazoo steel castings traffic from the railroads to steel-hauler motor carriers. Eaton contends that such a development would have a substantial negative impact on the environment from the standpoint of fuel consumption, air quality, and noise. In this connection, Eaton presents calculations based on current tonnage to show that conversion of the TOFC movement to highway operations would result in 429 truckloads from Baltimore averaging 40,000 pounds per load. Considering a mileage over the highway of 575 miles, and using an average of 5 miles per gallon of fuel consumed, the new highway movement would require 49,335 gallons of fuel. With the projected increase in 1977 to 618 truckloads, the highway movement would require consumption of 71,070 gallons of fuel.

Eaton also is concerned that its competitors in the area, located primarily at Indianapolis, Ind., and Toledo, Ohio will continue to have ready access to intermodal transportation facilities for their plants. Eaton contends that termination of the Kalamazoo TOFC service would subject its Kalamazoo plant to prejudice or disadvantage when competing with these other manufacturers.

Upjohn Company is a major manufacturer of pharmaceuticals, agricultural chemicals and plastics, with headquarters in Kalamazoo. Upjohn employs some 6,200 employees in the Kalamazoo area, which represents more than one-third of its worldwide employment. The Kalamazoo pharmaceutical plant serves the entire domestic market and 15 international markets. The plant is a substantial user of TOFC services at ConRail's Kalamazoo ramp; during 1975 Upjohn shipped outbound a total of 269 trailers and received 22 trailers inbound. It strongly protests the closing of this facility.

Upjohn presented a detailed showing of the substantial growth experienced in its use of TOFC service in the past several years. In the light of this growth and the potential for accelerating that growth in the foreseeable future, Upjohn argues that the closing of the Kalamazoo ramp would be a hasty and unjustifiable move on the part of ConRail. During the past 4 years, it points out, eastern railroads made more aggressive efforts to attract piggyback traffic, removing what Upjohn refers to as artificial rate barriers and establishing transit times competitive with motor carrier service, and have begun steadily to attract more TOFC traffic. In 1975, for the first time in more than 30 years, Upjohn shipped greater tonnage by rail in TOFC service than by motor carriers. In 1970, the Upjohn Kalamazoo facility shipped a total of 168 trailers in TOFC service. The total grew to 293 trailers in 1971, 325 trailers in 1972, 320 trailers in 1973, 440 trailers in 1974, and 679 trailers in 1975, representing a gross increase in annual volume of 312 percent in that 5-year period. The share of that volume moving to markets served over the ConRail absorbed lines increased from 12 trailerloads in 1970 to 301 trailerloads in 1975. The Penn Central participation in that volume increased from 3 trailers in 1970 to 269 trailers in 1975.

Upjohn presented a computation of the additional transportation costs its 1975 traffic would have borne in the absence of TOFC service. Restating those costs in terms of current costs for the various service alternatives available to Upjohn at Kalamazoo, including use of TOFC ramps at Battle Creek, Chicago, Detroit, and Grand Rapids, as well as direct motor common carrier service from Kalamazoo to destination, Upjohn's annualized costs for the 269 TOFC shipments would be increased by \$33,988, or 23.1 percent, over transportation costs using the ConRail ramp. Upjohn also points out that it actually paid Penn Central a total of \$109,218 for TOFC traffic in 1975. The Upjohn cost studies did not contain a calculation of the costs of using the Elkhart TOFC ramp, which ConRail proposes to continue in operation, because that ramp was initially proposed for closing and, secondly, because its drayage costs to Elkhart would range about \$120 per trailer, nearly \$100 more than present drayage costs to the Kalamazoo ramp. The net result would be to make the total transportation costs for a TOFC shipment, on a movement to New York City for example, almost identical to the direct motor common carrier costs. The price for the TOFC shipment over Elkhart would be about \$670, compared with about \$690 by motor common carrier direct. Upjohn believes that, considering the relative convenience and the complexities involved, its most feasible choice — and its most probable choice in selecting between these alternatives — would be the use of motor common carrier service on such shipments.

Upjohn also contends that closing the Kalamazoo TOFC ramp would give its principal nearby competitors an undue preference since its competitors — at Elkhart, Indianapolis, and Chicago — would continue to have direct TOFC service and rates from ConRail. On traffic to the Atlanta

market, for example, Miles Laboratories in Elkhart would have TOFC service available to it at a cost 32.3 percent lower than the cost to Upjohn in using its most suitable transportation alternative from Kalamazoo. Similarly, the costs to Eli Lilly in Indianapolis on shipments to Atlanta would be 38.4 percent less than Upjohn's and similar, though lower, cost differentials would apply on shipments to other markets.

Brown Company, a major manufacturer of forest products, opposes closing of the Kalamazoo TOFC ramp. About 25 percent of its outbound traffic from Kalamazoo moves by rail, the remainder by motor carrier. Of the rail portion, TOFC shipments totaled 650 trailer loads, compared with about 3,500 carloads during the year 1975. The rail carload traffic consists mainly of heavy shipments of large paper rolls, and this traffic is not likely to be diverted to TOFC service. However, the motor carrier portion of Brown's traffic could be diverted with the provision of competitive rates and transit times on TOFC service.

In addition to its outbound TOFC movements, Brown Company is hopeful also of developing a substantial inbound flow of waste paper products for recycling at the Kalamazoo plant from such areas as North Carolina, Maryland, and New York. Brown has "practically doubled" its consumption of such waste paper in the last year. This type of movement would be suitable for TOFC handling. No specific projection of possible tonnage was provided, however.

Brown expects that the closing of the Kalamazoo ramp will mean diversion of the TOFC traffic flow to motor carriers. On the other hand, Brown avers, substantially more traffic than now is shipped in TOFC service could be diverted to TOFC operations if the railroad could work with

shippers in the Kalamazoo area to negotiate the necessary rate and service factors. Brown's distribution manager expressed this view at the hearing:

Q. In your opinion, what would be necessary on the part of ConRail for your company to develop additional inbound TOFC tonnage to Kalamazoo?

A. In my opinion, we have to sit down with them and they with us look at the individual pieces of business to see what has to be done to make them profitable and competitive for us. I think this has to be done — well, it has to be done in a business manner rather than looking at the rates of the tariff. Just to say we have rates at this point going into Kalamazoo or what could we do about it. That is not the way to go about it.

The way to do it is to look at our business on a very intensive basis, both inbound and outbound to come up with a solution.

Q. Is your company willing to sit down with ConRail people to work toward developing additional inbound business of TOFC?

A. Yes, we attempted that prior to the suspension of these rates.

Q. What was the result of the effort?

A. We were not successful.

Q. They would not sit down with you or discuss it?

A. What we wanted them to do was to change the effective date on the suspension and allow the rates to go in such as they did at Elkhart for a trial period. Also, to sit down to see if we could make it a viable business.

We suggested we would look at our business carefully. We were prepared to change some of our purchasing patterns to reflect use of movement of piggyback service inbound. Those were some of the things we did. In all fairness, they did come to Kalamazoo after the rates had been suspended. That was not a satisfactory arrangement.

* * *

Clark Equipment Company is a multinational manufacturer of materials handling equipment, construction machinery, auto accessories, and refrigeration equipment. During 1974 it shipped 287 trailers outbound over the TOFC ramp at Kalamazoo, with that volume growing to 315 trailers in 1975. This traffic originates at its plant at Battle Creek, about 25 miles east of Kalamazoo, and represents about 10 or 15 percent of Clark's total outbound shipments from Battle Creek. The remainder moves by highway carriers, both private and for-hire. Inbound TOFC volume was 64 trailers in 1974 and 87 trailers in 1975. In addition, Clark is in the process of determining whether to move the production facilities to another plant, now located at La Porte, Ind., to the Kalamazoo area, which would mean the addition of nearly 700 more outbound TOFC shipments annually over the Kalamazoo ramp. That traffic now moves over TOFC ramps of several railroads in the Chicago area. The availability of a ConRail TOFC ramp at Kalamazoo is an important consideration in Clark's plan, but the final decision had not been made at the time of the hearing.

Should the Kalamazoo ramp be closed, Clark will probably dray its eastbound TOFC traffic to Detroit for connection with ConRail's TV Train 16 there, rather than use the Elkhart ramp. Use of the Detroit ramps will cost Clark a net additional \$83 per trailer, considering comparative drayage charges and rail rates. Detroit is directly east of Battle

Creek, and not significantly farther from Clark's Battle Creek facility than the Elkhart ramp. Clark has not been fully satisfied with service from the Elkhart ramp on past shipments from La Porte. It also believes that, in terms of cost and service, use of the Detroit ramp would be preferable to use of either Benton Harbor or Grand Rapids ramps on any eastbound traffic originating in the Kalamazoo area.

Kellogg Company of Battle Creek anticipates that it will incur about \$28,500 in additional transportation costs for its outbound TOFC volume, should the Kalamazoo service be terminated. Much of the outbound traffic moves to Baltimore for export to Puerto Rico and Europe. The added cost will be its net differential in using TOFC ramps at Detroit, the best alternative to the Kalamazoo service. It would prefer that Kalamazoo be served with a direct dedicated trailvan operation, but would continue to use it as a satellite because of the lower transportation cost. It would prefer not to haul its TOFC trailers westbound to Benton Harbor, Grand Rapids, or Elkhart for the Baltimore-bound traffic, since, among other things, that would be a circuitous movement involving higher railroad rates. Kellogg did not check the potential transit times, services, or costs of using the Chessie system TOFC ramp at Lansing, Mich., about 50 miles northeast of Battle Creek. The 1975 TOFC volume of the Kellogg Company through the Kalamazoo ramp included 178 trailers outbound and 144 trailers inbound. While the inbound traffic will stay about the same, outbound traffic is expected to grow to about 250 trailers during 1976.

The Kalamazoo County Chamber of Commerce presented a detailed statement of the economic situation of this area and its hopes and efforts for continued economic growth.

In particular, the business community here asks the Commission to require ConRail to provide TOFC service at Kalamazoo for at least a 12-month evaluation period. The Chamber of Commerce is confident that the number of trailers moving through the Kalamazoo TOFC ramp facility will increase considerably during the next 2 years, and it is concerned about the probable economic hardship in the area should the ConRail TOFC ramp be closed.

Kalamazoo County is located in southwestern Michigan, approximately midway between Chicago and Detroit, which are the third and fifth largest metropolitan areas in the nation. Within a 300-mile radius of Kalamazoo County resides a population of approximately 20 million people, and more than 32,000 manufacturing firms. This represents nearly 10 percent of the nation's population, and more than 13 percent of the nation's manufacturing firms. Within the boundaries of Kalamazoo County itself reside 2,200,800 persons, constituting more than 63,800 households with an effective annual buying income of nearly \$1 billion. The economic base of Kalamazoo County includes more than 400 manufacturing and processing firms which provide jobs to more than 25,000 employees, about 25 percent of the area's total labor force. Present unemployment in the county is about 8.3 percent, compared with a national average of 7.5 percent. Kalamazoo County has been making vigorous efforts to encourage and assist development and expansion of industrial growth in this area, and it is concerned that its substantial progress in this direction in the past 2 years will be curtailed if the ConRail TOFC facility at Kalamazoo is closed.

Corning Glass Company of Corning, N.Y., is a speciality glass manufacturer producing items generally for use in the home or in science and industry. Its major products extend

from such items as fluorescent tubing, light bulbs and television parts to laboratory containers, automobile headlight lenses, and optical glass. Its sales volume in 1975 was approximately \$939,000,000. In the vicinity of Corning the company operates six major manufacturing plants and one warehouse with over one million square feet of floor space. The bulk of production from this area is shipped to other Corning plants or warehouses for further distribution. The former Erie Lackawanna Elmira TOFC ramp is located about 5 miles from the Corning warehouse from which most of this traffic is moved.

The following table shows the pertinent volume in distribution origin flows of TOFC traffic shipped and received by Corning at Elmira in 1975:

**TOFC TRAILERS SHIPPED AND RECEIVED
AT ELMIRA, N.Y. RAMP
BY CORNING GLASS WORKS – 1975**

<u>Origin/Destination</u>	<u>Commodity</u>	<u>No. of TOFC Trailers</u>
From: Elmira, N.Y.		
To: Chicago, Ill.	Lab. Glass	106
Asheville, N.C.	Lamp Refractors	12
Miami, Fla.	Lab. Glass	7
Miami, Fla.	Incan. Bulbs	2
Los Angeles, Cal.	Lab. Glass	5
Houston, Tex.	Lab. Glass	1
TOTAL:		133
To: Elmira, N.W.		
From: Muskogee, Okla.	Lab. Glass	138
Bluffton, Ind.	TV Parts	84
Danville, Ky.	Glass Tubing	10
TOTAL:		232

For the 1975 TOFC shipments summarized above, Corning paid the railroads a total of \$187,271 for ramp-to-ramp transportation, and, in addition, it paid a total of \$41,676 for drayage.

Since 1960 Corning has received second-day delivery from the Erie Lackawanna on its TOFC shipments to Chicago over the Elmira ramp. Since ConRail has taken over, however, Elmira has been operated as a satellite terminal to Scranton, and transit times to Chicago have been ranging between 7 and 13 days.

Corning regards this service as unsatisfactory because it disrupts of a well established ordering/shipping cycle, making it very difficult for Corning and its customers to plan their supply operations. With respect to the use of an alternative ConRail TOFC ramp at Rochester, Corning estimates that its additional costs would be substantial. The cost of shipping a single trailer from Elmira to Chicago would increase from \$387 to \$524, or an annual increase of about \$14,500 based on the volume moved during 1975. Similarly, the added cost on shipments from Muskogee to Elmira would rise from \$809 to \$912, or an annual increase of about \$15,500 based on the volume moved during 1975. The distance from Elmira to Rochester is approximately 97 highway miles.

Thatcher Glass Manufacturing Company of Elmira, N.Y., is a major glass container manufacturer supplying the food processing and beverage industries. Thatcher Glass has a manufacturing plant in Elmira and, during the past 15 years, has used and come to depend upon TOFC service over the Erie Lackawanna ramp at Elmira. During 1975, 250 trailers were shipped over the Elmira ramp by Thatcher. Through the first 4 months of 1976 Thatcher had shipped a total of 84 trailers in TOFC service with an additional

52 trailers scheduled to be shipped within the next 2 months. The nearest alternative TOFC ramp is at Syracuse, 91 miles distant, but use of the Syracuse ramp would increase its drayage expense for each trailer by approximately \$163.

During April and May ConRail provided TOFC service in the Elmira area by its substituted service between Elmira and the "physical" TOFC ramp at Scranton, approximately 97 miles from Elmira. That service has not been satisfactory. During April for example Thatcher Glass shipped 40 trailers to Florida, over the Scranton ramp. It had requested 4 to 6 empty trailers per day for loading, anticipating that all 40 trailers would be loaded within 10 days. However, due to a lack of equipment in the Elmira area, loading of these 40 trailers was not completed until April 27. Prior to the ConRail operation, service to Tampa, Fla. from Elmira consistently took 6 days transit time, with a seventh day grounding at the destination ramp. The service on these 40 trailers handled by ConRail, however, ranged from 6 to 11 days, resulting in an average transit time of 8 days. Thatcher argues that closing of the Elmira ramp is not warranted by the facts, and that it should, in fact, be returned to its prior status as a "physical" terminal, as it had been under Erie Lackawanna operation.

Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission seek to prevent cancellation of TOFC rates and service at Hershey, Reading, Sharon, Scranton, and Swedeland. A witness for the Pennsylvania PUC presented data to rebut ConRail's cost showing and testimony of loaded trailer traffic for the final 4 months of 1975, as follows:

<u>Station</u>	<u>Inbound</u>	<u>Outbound</u>	<u>Total</u>
Hershey	0	45	45
Reading	251	297	548
Swedeland	179	154	333

The State argues that by ConRail's own evidence TOFC revenues exceed variable costs at Reading and Scranton.

No testimony was presented at the hearing by shippers from the Reading area, but traffic managers for two shippers at Reading, Parish Division - Dana Corporation and AM General Corporation, did transmit "statements of fact" to the Commission by mail, on May 20 and May 26, respectively. Since these traffic managers did not present themselves for cross-examination of their statements at the public hearing, their statements should not be regarded as evidence of record under this Commission's Rules of Practice. Because of the peculiar nature of this proceeding, however, with its potential for adverse impact on communities as well as individual shippers, we have concluded that it would be appropriate to consider this evidence. Their transmittal letters show that copies were forwarded to ConRail, and we will entertain any appropriate motion deemed necessary by ConRail to protect its interests. The important facts stated by these shippers are those showing the extent of their use of TOFC service from Reading during 1975, and the probable impact of the proposed cancellation.

AM General shipped a total of 142 loads over the Reading ramp during 1975, at a weight of 5.8 million pounds. It fears that loss "of our Plan II½ rates will jeopardize our bidding on new government contracts for new business." It provides no description of the exact nature of its movements, although it indicates that this traffic moves to South Bend, Ind., nor any estimate or projection of future traffic.

During the 6 month period through March 1976, the Parish Division - Dana Corporation shipped a total of 132 truckloads, averaging 42,000 pounds, over the Reading ramp. Of these 75 units were shipped to Fort Wayne, Ind.; 48 to South Bend, Ind.; 7 to Ft. Valley, Ga.; and 2 to Warren, Mich. The following table shows the pattern of these movements:

Month Shipped	Destination			
	Fort Wayne, Ind.	South Bend, Ind.	Ft. Valley, Ga.	Warren, Mich.
March, 1976	14	18	3	
Feb., 1976	18	5	3	
Jan., 1976	21			
Dec., 1975	8	13		
Nov., 1975	8	12		2
Oct., 1975	6		4	
6 Month Total	75 (57%)	48 (36%)	7 (5%)	2 (2%)

Shipper provides no description of the nature of the traffic involved, the potentials for its growth and balancing, nor any explanation for the changes in traffic flows shown above. Use of the Allentown ramp, Dana avers, would mean an additional freight and drayage charges that would be incurred. On 80,000 pound shipments, this would represent increases of 18.2 percent and 16.7 percent to its transportation costs to Fort Wayne and South Bend, respectively.

Discussion and Conclusion

Under section 15(8)(f) of the Interstate Commerce Act, ConRail, a common carrier by railroad, must bear the burden of proof regarding the justness and reasonableness of the proposed cancellation of TOFC rates at certain of its terminals. Elimination of TOFC rates necessarily termi-

nates ConRail's holding out to perform TOFC service at the affected points. In this proceeding, satisfaction of ConRail's statutory burden of proof turns on an examination of the cancellation in light of ConRail's responsibility under section 1(4) of the act to provide and furnish transportation upon reasonable request therefor. A failure to satisfy its section 1(4) responsibilities would, of course, constitute an unreasonable practice under section 1(6) of the act.

Proposals to cancel TOFC rates are a relatively new breed of animal. Until recently, new TOFC rates and ramp openings were the main activities in this area. However, as indicated by ConRail (Ex. 1, pp. 8-9) rail carriers are taking a hard look at reducing the number of TOFC terminals in order to improve service. To remain competitive with motor carrier service, rail TOFC service must match the price and service characteristics of the competition.

ConRail has candidly set forth its TOFC marketing strategy and desire to maximize its TOFC business. However, ConRail management is concerned that if its decision to enter into and exit from TOFC markets through tariff publication is unduly exposed to protracted legal proceedings it will be unable to function as an efficient competitor. Protestants, on the other hand, are concerned about preserving service which they feel is vital to the economic health of their industries and communities.

As to the legal issues, this is substantially a case of first impression. The proceeding most closely resembling the instant proceeding is the report and order of Review Board Number 4 in Investigation and Suspension Docket No. 9070, *TOFC Service at Columbia, Mo., Norfolk & Western Railway Co.*, (served May 20, 1976, not printed). That proceeding was reopened for reconsideration by our order served September 20, 1976, and is of limited value here. However,

there are other lines of decisions which offer assistance by analogy.

Recent cases involving cancellation of rates for livestock service provide useful standards for evaluating termination of service. In *Livestock, So., Sw., Cent., and W. Terr.*, 346 I.C.C. 418 (1974), Division 2 examined the cost of service borne by the carriers and the practical reasons advanced by the carriers for discontinuing a deteriorating, stand-by service. On the other side, the Division considered present and future demand for the service. Of course in the *Livestock* and in a proceeding like *Icing Services, U.S. Railroads*, 343 I.C.C. 67 (1973), the Commission was making a practical determination about the timed phase out of obsolete services. Here we are concerned with a type of service with a great future under the proper circumstances. Nevertheless, we believe it is appropriate to look to these reports and the long line of decisions governing railroad abandonment of services, i.e., *Missouri Pac. R. Co. Abandonment, Crete Branch*, 307 I.C.C. 189 (1959), to guide our decision here.

Our inquiry here is to seek a proper balance between the interests of the individual shippers and communities, on the one hand, and those of the carrier, on the other. On the user side we will address reliance, past and present, on these services, the prospective need for service, proximity of comparable alternative service, and the cost and convenience of alternative service. As to the carrier interests involved, we will look to the financial and operational burden of continuing service, the likelihood that continuing service will be consistent with the carrier's prior holding out to perform the service, see *I.C.C. v. Oregon-Washington R. Co.*, 288 U.S. 14 (1932), and whether an order to continue service would be an undue or stifling interference with reasonable efforts to conduct an economically viable operation.

In balancing these competing interests and sifting the opposing claims we should be able to identify reasonable requests for service which ConRail must, by law, respond to.

With these criteria in mind, we are persuaded that ConRail here has made a *prima facie* showing of the justness and reasonableness of its proposal. In the first place the overall proposal is in furtherance of the basic objectives of the USRA's supplemental report of September 1975 to the Final System Plan for ConRail. As pertinent here, ConRail proposes to streamline its TOFC operating structure by closing a number of the smaller TOFC ramp facilities it inherited from its bankrupt predecessors. Although there is no reliable quantification of dollar savings that will be achieved by the ConRail proposal, there is ample evidence that ConRail's costs will be reduced and its TOFC operations made more efficient and more competitive with motor carrier service. However, in several instances as discussed hereinafter, we find that protestants have adequately rebutted ConRail's *prima facie* case, and in these instances the TOFC services should not be terminated.

First, as to those communities where ConRail would continue to operate TOFC ramp facilities, ConRail has fully satisfied its burden of proof, and our order will allow cancellation of TOFC rates at the eight duplicative facilities (Buffalo, Niagara Falls - El, Niagara Falls - LV, and Syracuse, N.Y.; Cleveland, Ohio, Allentown, Harrisburg, and Lancaster, Pa.). The New York State Department of Transportation quite properly desired an opportunity to advise ConRail of its views before the final selection of ramp closings at these communities was fixed, as in the Niagara Falls-Buffalo area, for example, but the State does not present a factual basis for blocking ConRail's specific pro-

posals at this time. Otherwise, there also is no adequate factual justification presented on this record to overcome ConRail's reasons and plans for closing these duplicative facilities.

Next, however, there are two communities (Kalamazoo, Mich.; and Marion, Ohio) where we are persuaded ConRail TOFC service should not be terminated. As to these ramps, protestants have presented adequate, specific factual data to rebut ConRail's *prima facie* case for ending TOFC services.

More than 3,200 loaded trailers were shipped through the Penn Central's Kalamazoo TOFC facilities during 1975, and there is persuasive evidence of record demonstrating that there will be substantial growth in that volume in the coming months. While this ramp has been experiencing a serious imbalance in its traffic flow, a rate of three outbound for every inbound TOFC trailer, there is strong evidence of new and increasing inbound traffic volume, on the part of the Brown Company and the Eaton Corporation, for example.

There seems a likelihood, moreover, that additional inbound volume will be generated if the quality of this service were upgraded somewhat. Alternative TOFC ramps for Kalamazoo shippers are about 55 miles distant, and their use would be significantly slower, more expensive, and administratively burdensome. The substantial and rapidly growing flow of steel castings from Baltimore to Kalamazoo, for example, would be diverted to line-haul motor carriage. By the same token, the evidence on this record reveals that a quality TOFC service afforded by ConRail at Kalamazoo would be likely to stimulate further diversion of traffic from the highway, and this competitive possibility should not lightly be foreclosed.

In 1975 there were 7,159 trailers handled through Erie Lackawanna's Marion TOFC facility. Although United Parcel Service has now diverted its TOFC traffic from the former Erie Lackawanna ramp, Whirlpool Corporation originated 545 trailers in 1975 and continues to be a substantial TOFC shipper. Whirlpool is in the process of a \$10 million expansion of its Marion plant, and forecasts shipment of up to 7,500 TOFC trailers annually. ConRail provides no satisfactory justification on this record for ignoring this traffic potential. The cost and administrative inconvenience for Whirlpool in draying to Columbus could even work as an impediment to use of TOFC for the new traffic to be generated by expansion. ConRail does not address this matter and the failure to do so, we conclude, tips the scales in favor of retention of TOFC service at Marion.

We conclude that protestants have demonstrated a substantial and growing public demand for TOFC service under the rates proposed to be cancelled by ConRail at Kalamazoo, Mich., and Marion, Ohio, sufficient to constitute a reasonable request for transportation under section 1(4), and that cancellation of these rates would be unjust and unreasonable, and would constitute an unreasonable practice.

With respect to the other TOFC terminals involved in this proceeding, we believe that, in contrast to ConRail's *prima facie* justification for its proposals, those parties opposing cancellation of ConRail's rates and services have not made an adequate case for their continuation as a ConRail obligation. The Commonwealth of Pennsylvania and its Public Utility Commission argue strongly against discontinuance of TOFC service by ConRail at Sharon, Reading, Hersey, Scranton, and Swedeland. The Mercer County plant of Wheatland Tube Company will suffer serious disadvantages by a closing of the ConRail ramp at Sharon, and we have carefully weighed

its arguments as well as those of the Commonwealth of Pennsylvania on this issue. Nevertheless, we are persuaded that ConRail should be permitted to close this ramp. The volume of traffic there is not great and the imbalance ratio is well above the 3-to-1 level. There is no satisfactory predicate on this record for a reasonable expectation of significant change toward greater volume or balance at Sharon. While the ConRail alternative ramps will be a substantial distance away, the Chessie System operates a TOFC terminal just 14 miles distant at Youngstown. The C&O Service will not be fully satisfactory for Wheatland's needs, but here we find the balance of interests supports ConRail's proposal and that cancellation of the rates involved would not be an unreasonable. The situation at Elmira, N.Y., like Sharon, Pa., indicates a demand for service which is not necessarily best satisfied by requiring ConRail to continue maintaining a physical or satellite TOFC service. Traffic at Elmira is relatively light and imbalanced. It does not appear that it can be operated as a satellite terminal in a system which seeks to efficiently coordinate large volume movements in a service which is reasonably competitive with motor carrier operations. Alternative service is available at Binghamton, N.Y. from the D & H and ConRail offers second morning delivery to Chicago from ramps in Syracuse, Buffalo, and Rochester. Under these circumstances, it would be an unreasonable burden on ConRail to order service continued at Elmira.

The situation of Reading presents a difficult problem for resolution, but we think that the decisive factor here is the continued accessibility of ConRail TOFC service at a comparatively nearby ramp site, Allentown. Also, in contrast with the situations at Kalamazoo and Marion, there is no satisfactory indicator of meaningful growth in traffic volume, or improvement in traffic balance, at Reading for the fore-

seeable future. On these facts we are persuaded that the proposed cancellation of TOFC rates at Reading is just and reasonable.

There is no shipper opposition to closing the TOFC ramp at Hershey. There was only very light traffic tendered there to the former Reading Company in 1975. Since a ConRail TOFC ramp will continue to be available at Harrisburg, we think ConRail's proposed cancellation of the Hershey rates has been justified.

No shipper appeared at the public hearing in opposition to the proposed closing of the Scranton TOFC terminal. The Commonwealth of Pennsylvania opposes cancellation, but presents no adequate factual basis to overcome the ConRail evidence, particularly its showing that the United Parcel traffic will now move over Harrisburg, and that a second major shipper now plans to use the D&H TOFC facility at Wilkes-Barre instead. Pennsylvania's arguments do not stand up in the face of these facts. On balance, we believe the ConRail proposal to cancel the Scranton rates is adequately justified.

Similarly, ConRail has presented an adequate justification for closing the Swedeland TOFC ramp. There is alternate ConRail TOFC service from other locations in the Philadelphia metropolitan area, and there is no showing of any substantial, specific adverse effect on area shippers as a consequence of the Swedeland closing. Pennsylvania presents no factual justification for disapproving the ConRail proposal here.

There is no shipper opposition to ConRail's proposal for closing the former Lehigh Valley TOFC ramp at Wilkes-Barre, and, on brief, the Commonwealth of Pennsylvania withdraws its opposition to that proposal. The D&H has established a

new TOFC ramp about 10 miles from the ConRail ramp, and it appears that there is no significant public demand or need for the ConRail operation, which seems not to be competitive with that of D&H.

Closing of the Fort Wayne TOFC ramp is opposed by the Picture Tube Division of RCA, but that shipper will continue to have TOFC service available at ConRail's Huntington ramp, where RCA moved its export traffic almost exclusively during 1975. Apart from the evidence of RCA, there is no specific indication of probable future TOFC volume at Fort Wayne and, in fact, TOFC service will continue to be available in this community over the Norfolk and Western facility. In these circumstances we conclude that the ConRail proposal to close its facility at Fort Wayne has been adequately justified.

At Binghamton TOFC service will continue to be available from the D&H, which is aggressively seeking such traffic there. There is no opposition to ConRail's proposal, and we believe it has been adequately justified.

No opposition is presented with respect to the proposed closing of ConRail TOFC terminals at Utica, Port Jervis, Akron, Lima, Benton Harbor, Grand Rapids, or South Bend. In light of the facts shown by ConRail as to these operations, we are satisfied that ConRail should be allowed to close these ramps as proposed. There is comparatively light volume at Utica, and no evidence of potential growth is presented. The Port Jervis TOFC facility was used almost exclusively by United Parcel for traffic which has recently been diverted to other ConRail service. South Bend is only a short distance from Elkhart, where ConRail will operate a major concentration TOFC facility. At Benton Harbor, Grand Rapids, and Akron, TOFC service will continue to be available from the Chessie, while Norfolk and Western will continue to provide service at Lima. Accordingly the clear weight

of the evidence requires that we approve the ConRail proposal to cancel TOFC rates and services in these communities.

As noted above, ConRail will continue to operate its Huntington TOFC ramp under a line subsidy arrangement with Indiana. In effect, ConRail has withdrawn its proposal to close the Huntington ramp, but it will be embraced in our order for purposes of technical clarity.

We find that the tariff provisions under investigation, insofar as they provide for cancellation of TOFC rates at 24 designated terminals identified below, have been shown to be just and reasonable and otherwise lawful:

Indiana	New York	Ohio	Pennsylvania
Fort Wayne	Binghamton	Akron	Allentown
South Bend	Buffalo	Cleveland	Harrisburg
	Elmira	Lima	Hershey
	Niagara Falls (EL)		Lancaster
	Niagara Falls (LV)		Reading
	Port Jervis		Scranton
	Syracus		Sharon
<u>Michigan</u>	Utica		Swedeland
Benton Harbor			Wilkes-Barre
Grand Rapids			

We further find that to the extent such tariff provisions provide for cancellation of TOFC rates at Kalamazoo, Mich., Huntington, Ind., and Marion, Ohio, respondent has failed to establish that such provisions are just, reasonable, or otherwise lawful.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Commissioner O'Neal, dissenting in part:

I am satisfied that the opposition to the cancellation of rates and services as they affect the Sharon, Pennsylvania, and Elmira, New York, ramps, is adequate to require their continuation as ConRail obligations.

It is ordered. That respondent herein be, and its is hereby notified and required to cancel the schedules described in the order of the Commission, Division 2, on March 31, 1976, on or before November 20, 1976, upon not less than 10 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act, without prejudice to the filing of new schedules in accordance with the above findings.

And it is further ordered. That this proceeding be, and it is hereby discontinued.

By the Commission, Division 2.

ROBERT L. OSWALD
(SEAL) Secretary

APPENDIX F

SERVICE DATE
FEB 2 1977

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION

DOCKET NO. 9108 (COMPLAINT)
CANCELLATION OF TOFC SERVICE,
CONSOLIDATED RAIL CORPORATION

Decided January 28, 1977

Upon complaint, cancellation of TOFC service at Elmira, N.Y., found to be unlawful under sections 1(4), 1(5)(a) and 1(6).

Appearances as shown in Investigation and Suspension Docket No. 9108 and *Edward J. Carty, Carl L. Haderer, and Robert J. Walsh* for shipper interests.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

In a prior report, (Investigation and Suspension Docket No. No. 9108) decided October 28, 1976, Division 2 found just and reasonable, and otherwise lawful proposed cancellation of trailer-on-flatcar (TOFC) rates at 24 designated terminals in Indiana, Michigan, Ohio, New York, and Pennsylvania and found not shown to be just and reasonable the proposed cancellations at Kalamazoo, Mich., Huntington, Ind., and Marion, Ohio.

Under section 15(8)(a) of the act the Commission is required within 7 months to issue a final decision concerning the lawfulness of proposed carrier rate changes. However, if prior to the expiration of the 7 month period, the Com-

mission makes a prescribed report to Congress then a 3 month extension is available for making the final decision. In this case, the investigation and suspension report was issued two days before the expiration of the 7 month suspension period. No report to Congress was filed and no extension of time was made. Therefore, our prior decision constitutes the final decision of the Commission and pursuant to section 15(8)(a) the tariff matter which became effective at the close of the 7 month period may be set aside only, if upon complaint of an interested party, the Commission finds it to be unlawful.

We have before us petitions attacking the validity of the prior decision. Included in two of the petitions is additional evidence which was not available when the record which formed the basis of the prior decision was closed. In view of the fact that the investigation and suspension proceeding is now administratively final, pursuant to section 15(8)(a), we are treating the petitions as complaints against the effective cancellations of TOFC service and accept the evidence submitted in support thereof. Since ConRail has replied to the instant petitions (treated herein as complaints) it would serve no useful purpose to require petitioners to refile the same material under a complaint caption.

The petitions, to the extent they seek restoration of TOFC service at points other than Elmira, are devoid of merit. Our ultimate findings differ from those of the prior report with respect to the TOFC ramp at Elmira, New York.

By schedules filed to become effective April 1, 1976, Consolidated Rail Corporation (ConRail) proposed to cancel TOFC rates at 31 terminals formerly operated by the Penn Central Transportation Company, the Erie Lackawanna Railroad Company, the Reading Railway System, and the Lehigh Valley Railroad in the States of Indiana, Michigan,

New York, Ohio, and Pennsylvania. Upon protests filed by shipper protestants and State and Federal agencies, the Commission, Division 2, by an order served March 31, 1976, suspended the operation of the tariff to and including October 31, 1976, to the extent it affected 27 of the 31 terminals. Division 2, found just and reasonable, and otherwise lawful the cancellation of TOFC rates at 24 terminals, including Elmira, New York, in its report and order served October 29, 1976. The Division further found that ConRail had failed to show that cancellation of TOFC rates at Huntington, Ind.,¹ Kalamazoo, Mich., and Marion, Ohio, were shown to be just and reasonable. After the date of service of the report and order, ConRail voluntarily postponed the date upon which said schedule, with regard to Elmira, N.Y., was to become effective, until November 20, 1976.

ConRail's evidence and arguments, submitted in the investigation and suspension case briefly restated to the extent they involve service at Elmira, indicated the following: (1) the proposed cancellation is in furtherance of the "Final System Plan" (FSP),² which seeks to consolidate this traffic system-wide into major and flow corridors served by special "trailvan" trains; (2) The Elmira terminal, formerly operated by the Erie Lackawanna, was established as a relatively low volume terminal handling 423 inbound revenue loaded trailers and 975 outbound revenue loaded trailers during 1975; (3) the low traffic volume generated at this

¹ ConRail is presently operating this facility under a subsidy agreement with the Public Service Commission of Indiana, and it no longer seeks to discontinue service to and from the Huntington ramp.

² The (FSP) was issued by the United States Railway Association in accord with the provisions of the Regional Rail Reorganization Act of 1973, and approved by the Congress.

station would impose an operational (and subsequently a financial) burden on the new system in that it would not justify use of trailvan trains and regular flatcar service would not be competitive with over-the-road motor carrier service; (4) the 2-to-1 imbalance of outbound traffic over inbound traffic indicates that continued TOFC service at Elmira would not be an efficient operation; and (5) the affected shippers in the Elmira area have available alternate TOFC service offered by ConRail (which holds out second day ramp to ramp delivery at these terminals) between Chicago and Syracuse, N.Y., 90 miles distant from Elmira; Rochester, N.Y., 98 miles distant; Buffalo, N.Y., 143 miles distant; and by the Delaware and Hudson (D&H) at Binghamton, N.Y., 55 miles distant.

Corning and Thatcher presented evidence, in the investigation and suspension proceeding which, briefly restated, indicated: (1) both companies have used TOFC service at Elmira for over 15 years; (2) Corning shipped 133 outbound trailers and received 232 trailers during 1975; (3) the Elmira TOFC ramp is located about 5 miles from its Corning warehouse from which most of its TOFC traffic moves; (4) Corning has received second day service on movements to Chicago since 1960, except for the period during which Elmira was operated as a satellite terminal to Scranton; (5) use of alternative TOFC ramps would increase its per trailer costs from \$387 to \$524 or an annual increase of \$14,500; (6) Thatcher, while experiencing problems obtaining an adequate number of rail cars for its TOFC traffic continued to depend on the availability of service at Elmira even during that period this terminal was operated as a satellite for Scranton, Pa. terminal.

In the investigation and suspension proceeding, it was found that continued TOFC operations at Elmira would

place an unreasonable burden on ConRail. The decision was based on the relatively light and unbalanced traffic volume and the conclusion based on past operations that it could not successfully operate as a satellite terminal for any other station. Notice was taken of alternative TOFC services in the area.

In their petitions for reconsideration (treated herein as complaints for the reasons stated above) complainants set forth the following: (1) greater consideration must be provided to the long dependence of shippers on the availability of this service; (2) ConRail has no first hand knowledge of the burdens, if any, continued operations at Elmira would place on this reorganized system; (3) additional traffic will become available at Elmira as the economy improves and with the additional inbound traffic of Corning from its ceramic substrate facility at Parkersburg, W.Va.; (4) operations conducted at Elmira immediately prior to the hearing in the investigation and suspension proceeding are not indicative of the true nature of the traffic movements at this station in that the facility was operated as a "satellite" terminal for the Scranton, Pa. terminal, a distance in excess of 120 miles which greatly affected distribution operations, and was also subjected to a two-week embargo; (5) while ConRail voluntarily operated this facility as a "physical" terminal (one from which trailers are loaded directly onto the trains), after the hearing, all the involved shippers made relatively substantial use of the available service; Thatcher shows a 37 percent increase over comparable 1975 figures, and A&P offers new evidence of 107 trailers shipped through this ramp within a 13-week period; (6) use of alternative ConRail TOFC terminals, and the D&H noted above, are too distant to meet the shippers' transportation requirements and will increase the shippers' transportation costs significantly; Thatcher estimates its tender of traffic to motor carriers would increase

its annual transportation costs by \$96,700.00 based on its 1975 traffic volume; (7) Corning alleges that the cost revenue figures contained in ConRail's worksheet for its disallowed cost computations should have been considered herein, and that such figures demonstrate in 1974, movements from and to Chicago produced revenues in excess of variable costs by 14.7 percent and 16.6 percent, respectively; and (8) cancellation of the Elmira TOFC rates is premature at this time and considering the potential hardship on affected shippers continuation of such service should be required.

DISCUSSION AND CONCLUSIONS

Since complainants' contentions in regard to terminals other than Elmira have been found to be without merit, the sole issue remaining for discussion is whether ConRail's cancellation of TOFC service at Elmira, N.Y., is just and reasonable and otherwise lawful. In making this determination, we will follow the standard enunciated in the prior decision to weight and balance the interests of the community and affected shippers with those of the carrier. Consideration has been accorded to past and present reliance on this service and the prospective need for continued operations, to the proximity, costs and convenience of alternate service, and to the financial and operational burden continued service would place on the carrier, including whether an order requiring continued service would unduly interfere with the carrier's reasonable efforts to formulate an economically viable operation and whether continued service would be consistent with the carrier's prior holding out to perform such service. Considering these factors with regard to operations at Elmira, in light of the positions advanced by complainants, we are convinced that it has established that TOFC services at Elmira should be restored.

Initially, it is noted that TOFC service has consistently been provided at Elmira on a second day delivery basis for movements to Chicago. Corning and Thatcher have relied on this service since its inception in 1960. Alternative TOFC terminals in the area do not provide an adequate substitute to this past service. The nearest ConRail facility is at Syracuse, 90 miles to the north of Elmira. The facilities of the D&H at Binghamton are 55 miles from Elmira and cannot provide direct east-west service; traffic moving to and from Chicago would most likely be routed through Buffalo, incurring additional time, expense, and administrative inconvenience. If the lack of TOFC service is allowed to continue, shippers will be forced to transfer an appreciable amount of their traffic to motor carriers with substantial increase in shippers' cost and greater fuel consumption.

In the investigation and suspension proceeding, little merit was attached to the cost evidence submitted by ConRail on the basis that such costs were incurred by that carrier's predecessor companies and did not take into consideration anticipated economies in operation that the consolidated system would provide. However, that rationale is not necessarily applicable to shippers' use of this evidence which demonstrates that in 1974, revenues from operations conducted between Chicago and Elmira exceeded variable costs, but not fully allocated costs. Additionally, Corning and Thatcher have established that greater traffic, both inbound and outbound can be anticipated from their operations. It is also not unreasonable to expect some traffic formerly moving by the terminated TOFC service at Binghamton and at Scranton may be transferred to Elmira. Considering this and anticipated operational savings from the consolidation, we cannot foreclose the possibility that continued service at Elmira will be profitable.

We conclude that a public demand, constituting a reasonable request for transportation under section 1(4), has been demonstrated for continued TOFC service at Elmira, N.Y., and that cancellation of these rates by ConRail is unjust and unreasonable, and constitutes an unreasonable practice.

Upon complaint, we find that ConRail's cancellation of TOFC rates at Elmira, N.Y., is unlawful.

COMMISSIONERS MURPHY, BROWN AND HARDIN
concur in the result.

It is ordered. That Consolidated Rail Corporation be, and it is hereby, notified and required to restore TOFC rates and services at Elmira, New York, on or before February 15, 1977, upon not less than 5 days' notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act.

It is further ordered. That this proceeding be, and it is hereby, discontinued.

By the Commission.

(SEAL)

ROBERT L. OSWALD
Secretary

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,

vs.

No. 77-1147

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW

Commonwealth of Pennsylvania, and Pennsylvania Public Utility Commission, hereby petition the court for review of orders of the Interstate Commerce Commission in its I. & S. Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, dated October 28, 1976 (served October 29), and January 28, 1977 (served February 2).

ROBERT P. KANE, *Attorney General*
Capitol Annex,
Harrisburg, Pa. 17120

BARNETT SATINSKY, *Chief Counsel*
JOHN B. WILSON, *Asst. Counsel*
CANDACE N. KREIGER, *Asst. Counsel*
P.O. Box 3265
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL, *Spec.*
Asst. Counsel
1100 17th Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

February 3, 1977

Supreme Court, U. S.
FILED

NOV 10 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-478

COMMONWEALTH OF PENNSYLVANIA, et al.,

Petitioners

v.

UNITED STATES, et al.,

Respondents

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia**

**BRIEF OF RESPONDENT-INTERVENOR
CONSOLIDATED RAIL CORPORATION
IN OPPOSITION**

**RICHARD J. MURPHY
1138 Six Penn Center
Philadelphia, Pa. 19104**

Attorney for Respondent-Intervenor

November 8, 1977

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-478

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners

v.

UNITED STATES, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

**BRIEF OF RESPONDENT-INTERVENOR
CONSOLIDATED RAIL CORPORATION
IN OPPOSITION**

Consolidated Rail Corporation (Conrail) respectfully submits this Brief in opposition to the petition of the Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission (Pennsylvania).

(1)

OPINION BELOW

The order of the U.S. Court of Appeals discussing the review proceeding, not reported, is printed in Appendix A, p. 1a, to the petition herein. The review proceeding alleged error in one aspect of the October 29, 1976 report and order of the Interstate Commerce Commission in its I&S Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, not yet reported, printed in Appendix E, pp. 9a-58a, to the petition herein. A subsequent ICC order of February 2, 1977 in that case which made the review proceeding moot, not yet reported, is printed in Appendix F, pp. 59a-66a, to the petition herein.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court, pursuant to 28 USC 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in granting the motion of the petitioners before it to dismiss as moot a petition for judicial review of an order of the Interstate Commerce Commission over the objection of a party which became an intervenor after the motion to dismiss was filed.

STATEMENT OF THE CASE

Corning Glass Works and Thatcher Glass Manufacturing Company (Elmira interests) instituted the proceeding below by filing in the Circuit Court of Appeals for the District of Columbia a joint petition for judicial review of an October 29, 1976 order of the Interstate Commerce Commission. That petition asserted that the Commission order was invalid insofar as it allowed Conrail to discontinue Trailer-On-Flat-Car (TOFC) service at Elmira, N.Y.

On February 2, 1977, the Commission served another order which required restoration of TOFC service at Elmira. Therefore, on February 18, the Elmira interests moved to dismiss the proceeding on the ground that the Commission had provided the relief requested in the court action, thus making their petition for review moot (App. A). The Court of Appeals granted that motion. The order granting the motion to dismiss is the order or judgment which the petitioners here (Pennsylvania) seek to reverse.

Pennsylvania sought to become party to the proceeding in the court below by filing a petition to the Circuit Court for leave to intervene on February 3, 1977.¹ That petition for leave to intervene was granted on February 23, 1977. Thus, Pennsylvania did not become an intervenor until after the Elmira interests had filed their motion to dismiss as moot.

Pennsylvania has instituted a separate proceeding in the Circuit Court of Appeals for the District of Columbia for review of the same order of the ICC that was before the Court of Appeals in the case below, No. 77-1147 (D.C. Cir.), *Commonwealth of Pennsylvania v. I.C.C.* That other case has been briefed and is pending before the

1. That petition for leave to intervene was filed more than 30 days after the proceeding was instituted and therefore was late filed, in violation of F.R.A.P. 15(d).

Court of Appeals. In that case, the respondents and intervenors in support of respondents urge the Court of Appeals to dismiss the petition on the ground that it was not timely filed within the 60-day limitation of the Hobbs Act, 28 USC 2344, and on the further ground that the Commission order is valid in all respects. Pennsylvania has argued to the contrary on both issues.

ARGUMENT

This proceeding does not present an important question which warrants review by this Court.

Petitioners' strained argument (Brief, pp. 11-13), that the effect of the unpublished order which dismissed the proceeding below will encourage use of the form of review contained in 28 USC 2344 and therefore cause a "sea of paperwork" in the Court of Appeals, is an outstanding example of hyperbole which reveals the lack of merit in the petition.

Petitioners do not cite any opinion that is in conflict with the action of the Circuit Court of Appeals in granting the motion for dismissal which was made by the party which instituted the proceeding. Moreover, none of the cases cited by petitioners deal with the rights of a party which was allowed to intervene *after* the petitioner below had sought dismissal on the grounds of mootness.

Even if it be true, as argued by petitioners, that the trend of the decisions is not to restrict intervenors to the issues raised by the parties that instituted the proceeding (Ptn., p. 14), the cases cited to show this trend² do not hold that a proceeding cannot be dismissed as moot at the request of the party which brought the case. The two cases cited by petitioners which involved proceedings to set aside orders of the Interstate Commerce Commission³ dealt with issues raised by intervenors, as well as the party

2. *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969), vac. other grds sub nom. *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 427 (1976); *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 352 F.2d 822, 827 (2d Cir. 1963); *New York Central Railroad Company v. United States*, 200 F. Supp. 944, 948-50 (S.D. N.Y. 1961); *Auto Workers v. Scofield*, 382 U.S. 205 (1965); *United States v. Bursey*, 515 F.2d 1228 (5th Cir. 1975)

3. *Widing Transp., Inc. v. I.C.C.*, 545 F.2d 654, 656 (9th Cir. 1976); *Chem-Haulers, Inc. v. United States*, 536 F.2d 610 (5th Cir. 1976)

that instituted the proceeding. In each of those cases, the Commission order was sustained. Neither of those cases specifically dealt with the question of what issues can be raised by intervenors. Each of those cases was prosecuted to conclusion by the parties which instituted the case. Thus, they do not deal with the unusual and unique procedural question that was presented by the motion to dismiss on the grounds of mootness. Those cases are not in conflict with the action of the court below.

Penn Central Merger Cases, 389 U.S. 486 (1968), also cited by petitioner is not pertinent here. The lower court order which was sustained by this court in that case was entered for the sound purpose of preventing a multiplicity of litigation regarding the Commission's merger and inclusion decisions. It does not hold that an intervenor may require a case to be continued over the objection of the party that commenced the action.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. MURPHY
1138 Six Penn Center
Philadelphia, Pa. 19104
Attorney for Respondent-Intervenor

November 8, 1977

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2153

CORNING GLASS WORKS and
THATCHER GLASS MANUFACTURING COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Motion to Dismiss Petition for Review

Come now Petitioners Corning Glass Works and Thatcher Glass Manufacturing Company and move the Court to dismiss their Petition for Review for the following reasons:

Petitioners instituted this action seeking review of the Commission's, Division 2's, Report and Order served on or about October 29, 1976, in Investigation and Suspension Docket No. 9108, *Cancellation of TOFC Service, Consolidated Rail Corporation*, which found, as pertinent herein, that ConRail's proposed cancellation of TOFC service at Elmira, New York, was shown to be just and reasonable.

On or about November 17, 1976, Petitioners filed separate petitions with the Commission seeking reconsideration of Division 2's above Report and Order. However, because Section 303(h) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, which

amends Section 17 of the Interstate Commerce Act, 49 U.S.C. § 17, provides that ". . . any decision, order, or requirement of the Commission, or of a duly designated division thereof, shall be final on the date on which it is served . . .", Division 2's Report and Order was considered administratively final and ripe for judicial review. Accordingly, on December 27, 1976, Petitioners filed their petition requesting this Court to review said decision.

In a Report and Order served on February 2, 1977, in Investigation and Suspension Docket No. 9108 (Complaint), *Cancellation of TOFC Service, Consolidated Rail Corporation*, the full Commission, treating the petitions filed on or about November 17, 1976, as complaints, found that the cancellation of TOFC service at Elmira, New York, was unlawful under Sections 1(4), 1(5)(a) and 1(6) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 1(5)(a) and 1(6). Pursuant to the terms of that Order, ConRail restored TOFC service at the Elmira ramp on or about February 15, 1977.

This subsequent Commission action has provided Petitioners the relief they were seeking in the instant action before this Court. It therefore appears that Petitioners' interest in the instant action has been mooted.

Wherefore, Petitioners move the Court to dismiss their Petition for Review.

Respectfully submitted,

Of Counsel: JOHN R. BAGILEO
REA, CROSS & AUCHINCLOSS John R. Bagileo
700 World Center Building 918-16th Street, N.W.
918-16th Street, N.W. Washington, D.C. 20006
Washington, D.C. 20006 Phone: 202-785-3700
Counsel for Petitioners

Dated: February 18, 1977

No. 77-478

Supreme Court, U.S.
FILED

DEC 8 1977

MICHAEL RUBIN, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-478

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

On October 29, 1976, Division 2 of the Interstate Commerce Commission held lawful the cancellation by the Consolidated Rail Corporation of trailer-on-flatcar (TOFC) service at 24 designated terminals, including Elmira, New York, and various points in Pennsylvania (Pet. App. 9a-58a). Two shippers at Elmira filed a timely petition for review of this decision in the United States Court of Appeals for the District of Columbia Circuit, alleging that the decision, as it applied to Elmira, was invalid (Pet. App. 5a-8a). The Elmira shippers, as well as petitioners (who seek to restore service at two Pennsylvania terminals) and protestants opposing the cancellation at other terminals, also applied to the full Commission for reconsideration of Division 2's determination.

On February 2, 1977, the Commission held that under Section 15(8) of the Interstate Commerce Act, 24 Stat. 384, 49 U.S.C. 15(8), as amended by Section 202(c) and (e)(2) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub L. 94-210, 90 Stat. 35, 37, the ruling by Division 2 was a final decision¹ that could be modified only in a complaint proceeding (Pet. App. 59a-60a). It therefore treated the petitions for reconsideration of Division 2's decision as complaints. On the merits, the Commission held that the cancellation of TOFC service at Elmira was unlawful (Pet. App. 60a-66a), but it rejected as without merit the complaints of petitioners and others protesting the cancellations at other terminals (Pet. App. 60a, 64a).

On February 3, 1977, petitioners filed a separate petition for review of both Division 2's October 1976 order and the Commission's February 1977 order (Pet. 9), and applied for leave to intervene in the review proceeding previously initiated by the Elmira shippers. The court of appeals granted the motion to intervene on February 23, 1977 (Pet. 8).

Because the Commission's February 1977 order granted the Elmira shippers the relief they sought, they moved to dismiss their petition for review. Over petitioners' opposition, the court of appeals granted the motion, noting that "the only issue properly before the court [in this proceeding] is the lawfulness of the cancellation of service at Elmira, New York" (Pet. App. 1a).

¹Section 15(8), as amended, requires the Commission to complete any hearing on the lawfulness of tariffs within seven months; Division 2's decision was entered two days before expiration of this period (Pet. App. 59a-60a).

The decision of the court of appeals is correct and presents no issue warranting review by this Court. Generally, an intervenor is "limited to the field of litigation open to the original parties." *Columbia Gas Co. v. Armer. Fuel Co.*, 322 U.S. 379, 383. Intervention in a proceeding in the court of appeals to review an administrative order is authorized by Fed. R. App. P. 15(d) so that parties with an interest in the issues presented by the original petitioners may protect that interest. Cf. Fed. R. Civ. P. 24. The scope and nature of intervention in review and enforcement proceedings in the courts of appeals depends both on the particular statutory scheme (*Auto Workers v. Scofield*, 382 U.S. 205) and the discretion of the court of appeals to control the proceedings before it (*Amoco Production Co. v. Federal Power Commission*, 465 F. 2d 1350, 1355 (C.A. 10)). Intervention is not, however, a substitute for an independent proceeding raising different issues (cf. *United States v. Continental Casualty Co.*, 16 Fed. R. Serv. 24c.42 case 1 (E.D. Pa.)) nor can it serve as a vehicle by which parties may challenge administrative orders which have become final as to them. See 3B Moore's *Federal Practice*, para. 24.16[1] (2d ed. 1977).

In this case the original petition for review challenged only the cancellation at Elmira, New York; the issues presented by that petition turned on the facts relating to that terminal. Petitioners' challenges as intervenors attempted to raise issues involving entirely different facts at other terminals.² In these circumstances, the court of

²Contrary to petitioners' contention (Pet. 15), the decision below does not conflict with the *Penn-Central Merger Cases*, 389 U.S. 486. In that case, this Court barred further litigation by the Pennsylvania intervenors, except with respect to specific curtailments of service in the future. *Id.* at 504-506. Those parties in effect had been required to

appeals correctly concluded that because the case presented by the original petition for review had become moot, the proceeding should be dismissed.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission.

DECEMBER 1977.

intervene as plaintiffs in the district court to permit consolidation of the numerous challenges to the merger in a single three-judge district court. See *Erie-Lackawanna Railroad Company v. United States*, 279 F. Supp. 303 (S.D. N.Y.); and 279 F. Supp. 313 (S.D. N.Y.). Apart from the exception noted, the complaints of the Pennsylvania intervenors involved questions of fact and law common to the principal litigation, e.g., "the anticompetitive consequences of these decisions and the financial situation and prospects of the Pennsylvania and New York Central as independent lines." 389 U.S. at 504. Petitioners' claim in this case, however, did not raise questions common to the original petition. Moreover, under present procedures no case like *Penn-Central* can arise, because all challenges to Commission decisions must initially be transferred to the court of appeals in which the first petition for review was filed. 28 U.S.C. 2112(a).

³It is still open to petitioners to pursue the review proceedings that they initiated themselves. The government is contending that this petition for review is untimely under the jurisdictional 60-day limit in 28 U.S.C. 2344 (Pet. 9-10), but there has been no determination of that issue by the court of appeals.

Supreme Court, U.S.
FILED

No. 77-478

DEC 15 1977

MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States
October Term, 1977

**COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,**
Petitioners.

vs.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

ROBERT P. KANE, *Attorney General*
Capitol Annex
Harrisburg, Pa. 17120

BARNETT SATINSKY, *Chief Counsel*
JOHN B. WILSON, *Asst. Counsel*
CANDACE M. KREIGER, *Asst. Counsel*
Penn. Public Utility Commission
P.O. Box 3265
Harrisburg, Pa. 17120

GORDON P. McDougall, *Special
Asst. Counsel*
1100 17th Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

DECEMBER 1977

In the
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-478

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

The Government argues that intervenors before the U.S. Court of Appeals in a proceeding for direct review of an agency order¹ are governed by the scope of intervention allowed by the particular statutory scheme and the discretion of the Court of Appeals.² From this,

¹ The I.C.C.'s October 29, 1976 decision is now reported. *Cancellation of TOFC Service*, 355 I.C.C. 26.

² The Government refers to the 1944 *per curiam* opinion in *Columbia Gas Co. v. Amer. Fuel Co.*, 322 U.S. 379, which has never been cited by this court in any subsequent opinion.

the Government contends that Elmira's petition for review³ challenged only the cancellation of railroad service at Elmira, N.Y., with "facts" involving cancellation at Reading and Sharon, Pa. being "entirely different", so that the court below properly dismissed the review proceeding over the vigorous objection of the Pennsylvania parties. (Govt. Memo, pp. 3-4).

The short answer is that parties to I.C.C. proceedings may intervene as a matter of right in judicial review of the I.C.C.'s order.⁴ *Brotherhood of Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519, 524-25; 28 U.S.C.

2323. We suggest that the Supreme Court in 1968, by promulgation of a "notice" form of petition for review, sought to end the practice of the various Court of Appeals to control effective intervention in review of federal agency decisions. *Rules of Appellate Procedure*, 43 F.R.D. 61, 137. See: F.R.A.P. 15(a).

Respectfully submitted,

ROBERT P. KANE, *Attorney General*
Capitol Annex
Harrisburg, Pa. 17120

BARNETT SATINSKY, *Chief Counsel*
JOHN B. WILSON, *Asst. Counsel*
CANDACE N. KREIGER, *Asst. Counsel*
Penna. Public Utility Commission
P. O. Box 3265
Harrisburg, Pa. 17120

GORDON P. MacDOUGALL, *Spec.*
Asst. Counsel
1100 17th Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

DECEMBER 1977

³ Elmira's petition for review is set forth in its entirety. (Pet., 5a-8a).

⁴ A single order was issued by the I.C.C. for the termination of all TOFC service at 27 stations. (Pet., 58a).